# TRANSCRIPT OF RECORD

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950.

No. 349

THE FIRST NATIONAL BANK OF CHICAGO,
EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON,
DECEASED,

*Petitioner,*

*vs.*

UNITED AIR LINES, INC., A CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

In the

# United States Court of Appeals

For the Seventh Circuit

No. 10337

THE FIRST NATIONAL BANK OF CHICAGO, Executor of the Estate of JOHN LOUIS NELSON, Deceased,

*Plaintiff-Appellant,*

vs.

UNITED AIR LINES, INC., a Corporation,

*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED FEB. 5, 1951.

PRINTED RECORD.

In the

# United States Court of Appeals

## For the Seventh Circuit

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**No. 10337**

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THE FIRST NATIONAL BANK OF CHICAGO, EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,

*Plaintiff-Appellant,*

*vs.*

UNITED AIR LINES, INC., A CORPORATION,

*Defendant-Appellee.*

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 1st day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 175th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Friday, January 26, 1951.

Court met pursuant to adjournment.

Present: Honorable Philip L. Sullivan, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

| | |
|---|---|
| The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, *Plaintiff-Appellant,* *vs.* United Air Lines, Inc., a corporation, *Defendant-Appellee.* | No. 48 C 1473. |

STATEMENT PURSUANT TO RULE 10 B OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

This suit was commenced on October 5, 1948. The original parties were the plaintiff, The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, deceased, and the defendant, United Air Lines, Inc.

The several dates on which the respective pleadings were filed in this cause are as follows:

Filing Date and Pleading

1948

10/5 —Complaint.

11/15—Answer.

1950

4/26—Motion to Strike Third Defense of Defendant's Answer and in the Alternative to Transfer the cause.

11/8 —Amended Motion to Strike Third Defense of Defendant's Answer and in the Alternative to Transfer.

11/16—Amendment to Motion to Strike.

3 1951

1/26—Second amended Motion to Strike Third Defense of Defendant's Answer, and in the Alternative to Transfer Cause.

The motion to strike the third defense of defendant's answer and in the alternative to transfer the cause was denied and said cause dismissed by the Honorable Judge Sullivan on January 26, 1951, by an order entered on said date. The appeal from said order was on January 26, 1951.

4 IN THE UNITED STATES DISTRICT COURT
(Caption—48-C-1473)

Be It Remembered, that, on to-wit, the 5th day of October, 1948, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

5 IN THE DISTRICT COURT OF THE UNITED STATES
(Caption—48-C-1473)

## COMPLAINT.

Now comes the plaintiff, The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, and complains of the defendant, United Air Lines, Inc., a corporation, and says:

1. On the 24th day of October, 1947, the defendant, United Air Lines, Inc., was a corporation duly organized and existing and was engaged in the carriage of passengers for hire by aircraft, and the defendant was possessed of divers aircraft used by it in the conveyance of said passengers, and employed divers servants in the upkeep, maintenance and operation of said aircraft, all in the County of Garfield and the State of Utah.

2. The defendant was on said date a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and was then and ever since has been and now is a citizen and resident of the State of Delaware, and plaintiff was on said date and still is a citizen and resident of the State of Illinois, and the amount
6 involved herein is in excess of $3,000.00. Federal jurisdiction is based upon the diversity of citizenship of the plaintiff and the defendant.

3. The plaintiff's testate was then and there a passenger for hire upon a certain aircraft then and there operated and controlled by the defendant. The said flight departed Los Angeles, California, destined for Chicago, Illinois, and at the time of the occurrence hereinafter described was cruising at an altitude of 1900 feet over the State of Utah.

4. The gasoline for fuel consumption on said aircraft was contained in four main and four alternate tanks; the auxiliary tanks were empty. The No. 3 alternate tank vent outlet was located on the right side of the fuselage near the leading edge of the wing and close to the bottom wing fillet. At a point 10 feet aft of this point and slightly to the left there was an air scoop which served as a source of cabin heater combustion air and cooling air for the cabin supercharger air after-cooler and cabin supercharger oil cooler; and overflow gasoline coming from the No. 3 alternate tank through the air vent line and out the vent outlet would sweep back in the slip stream toward the cabin heater combustion air intake scoop. The entry of fuel overflow into the scoop in flight while the heater was operating was likely to backfire and thereby propagate flame downstream into the air scoop, and incoming fuel would thereafter be likely to continue to burn in the air scoop and duct.

5. The defendant then and there maintained on said aircraft emergency landing flares which were highly combustible and so located on said aircraft as to make their presence hazardous.

6. While the said aircraft was then and there in flight over the State of Utah, and the plaintiff's testate was riding therein, in the exercise of ordinary care for his own safety, as a passenger for hire, the said aircraft, by reason of said dangerous and defective construction thereof, and by reason of the unskillful and careless conduct of the defendant's servants in providing, maintaining and operating the same, became ignited, took fire and burned, and was thereby caused to be precipitated to the ground with great force and violence, and by reason thereof plaintiff's testate was so greatly injured and damaged that as a result thereof he then and there died.

7. The defendant was then and there guilty of one or more of the following acts of negligence which directly caused injury to the plaintiff's testate resulting in his death:

(a) The defendant so carelessly, negligently and improperly ran, managed, operated and propelled said air-

craft that the same became ignited and fell to the ground.

(b) The defendant carelessly and negligently permitted gasoline to enter the cabin heater air intake scoop from the No. 3 alternate tank vent.

(c) The defendant carelessly and negligently permitted an overflow of gasoline during the transfer of fuel from the No. 4 alternate tank.

(d) The defendant carelessly and negligently constructed and maintained said aircraft by improperly locating the No. 3 alternate tank or vent outlet so that gasoline might escape therefrom into the cabin heater combustion air intake scoop and become ignited.

8 (e) The defendant carelessly and negligently kept and maintained the emergency landing flares without proper protection from ignition.

(f) The defendant carelessly and negligently failed to properly instruct, warn and inform its servants in charge of the operation of said aircraft as to the dangers involved in its operation.

8. As a direct and proximate result of said acts of negligence, the plaintiff's testate was then and there so greatly cut, injured and damaged that as a result thereof he then and there died, and plaintiff's testate left him surviving, as his only heirs at law and next of kin, Rebecca E. Nelson, his widow, Ralph O. Nelson and James R. Nelson, his sons, and Ruth N. Gobel, his daughter, who by reason of the death of plaintiff's testate, have suffered pecuniary loss and damage and have been deprived of support, sustenance and maintenance and divers pecuniary benefits which they might otherwise have received by the continued life of plaintiff's testate.

Plaintiff demands damages in the sum of Two Hundred Thousand Dollars ($200,000.00).

Royal W. Irwin,
Bishop, Mitchell and Burdett,
*Attorneys for Plaintiff.*

Royal W. Irwin,
29 S. LaSalle Street,
Chicago 3, Illinois,
Tel.: FR. 2-5454.

And afterwards on, to wit, the 12th day of October, 1948 there was filed in the Clerk's office of said Court a certain Summons With Marshal's Return Endorsed Thereon, in words and figures following, to wit: —

UNITED STATES DISTRICT COURT.

(Caption—48-C-1473)

## SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon Royal W. Irwin, plaintiff's attorney, whose address is 29 South La Salle Street, Chicago, Illinois an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Roy H. Johnson,
*Clerk of Court.*
Marguerite Gilmour,
*Deputy Clerk.*

(Seal of Court)

Date: October 5, 1948.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

United States Marshal's Return,

Northern District of Illinois.

Served this writ together with copy of complaint on the within named United Air Lines Inc. by delivering copies thereof to K. R. Gregory, assistant secretary of the C. T. Corporation System, registered agent for the United Air Lines, Inc., this 6th day of October, A. D. 1948. The President of the United Air Lines, Inc., not found in my District.

T. P. O'Donoyan,
*United States Marshal.*
Wm. Raff,
*Deputy.*

| | |
|---|---|
| 1 Ser | 2.00 |
| 2 mi | 12 |
| | 2,12 |

Endorsed: United States District Court * * (Caption—48-C-1473) * * Summons in Civil Action. Returnable not later than 20 days after service. Royal W. Irwin and Bishop, Mitchell & Burdett, Attorneys for Plaintiff.

11 And afterwards on, to wit, the 25th day of October, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Appearance in words and figures following, to wit:

12 UNITED STATES DISTRICT COURT.
* * (Caption—48-C-1473) * *

APPEARANCE.

We hereby enter the appearance of United Air Lines, Inc., a corporation as defendant in the above entitled case and that of ourselves as attorneys for said defendant.

Dated: October ..., 194....

David Jacker &
Charles M. Rush,
*Attorneys for said Defendant, United Air Lines, Inc.,*
Address: 33 No. La Salle Street,
Room 3200,
Telephone RA 6-2929, Chicago,
Kirkland, Fleming, Green, Martin & Ellis.

13 And afterwards on, to wit, the 15th day of November, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer To Complaint in words and figures following, to wit:

14 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-1473) * *

ANSWER TO COMPLAINT.

Now comes United Air Lines, Inc., by David Jacker, Charles M. Rush and Kirkland, Fleming, Green, Martin & Ellis, its attorneys, and for its answer to the complaint says:

1. That it admits the allegations of Paragraph 1, excepting the allegation "all in the County of Garfield and the State of Utah," which allegation it denies.

2. That it admits the allegations of Paragraph 2.

3. That it admits the allegations of Paragraph 3, excepting the allegation "was cruising at an altitude of 1900 feet," which allegation this defendant denies.

4. That it admits the allegation of Paragraph 4 beginning with "The gasoline for fuel consumption * * *" up to and including "and cabin supercharger oil cooler," but as to the remaining allegations in said Paragraph 4 this defendant is without knowledge or information sufficient to form a belief as to the truth of said allegations, and therefore denies said allegations.

5. That it admits that the said aircraft was equipped with emergency landing flares which were highly combustible; that it is without knowledge or belief as to the truth of the averment that these emergency landing flares were located on said aircraft as to make their presence hazardous, and therefore denies the same.

6. That it admits that the plaintiff's testate was riding in the said aircraft in its flight over the State of Utah; that it is without knowledge or information sufficient to form a belief as to the truth of the averment that the plaintiff's testate was in the exercise of ordinary care for his own safety, and therefore denies the same, and it denies that by reason of the unskillful and careless conduct of the defendant's servants in providing, maintaining and operating the same it was thereby caused to be precipitated to the ground with great force and violence, resulting in the death of the plaintiff's testate.

7. That it denies the allegations of Paragraph 7.

8. That it denies that the plaintiff's testate died as a result of any negligence on the part of this defendant, and that it is without knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 8, and therefore denies the same.

## Second Defense:

Plaintiff failed to file with defendant, at defendant's general office, a written notice of plaintiff's claim within ninety (90) days after the alleged occurrence of the events complained of as required under General Rule 17(A) of Local and Joint Passenger Rules Tariff No. PR-2, issued September 23, 1947, effective October 23, 1947, and on file with the Civil Aeronautics Board in Washington, D. C., and at all offices of the carrier, according to law. These rules are and at all times since the alleged occurrence of the events

complained of have been, in full force and effect. Defendant was and is a carrier participating in said rules. According to these rules, plaintiff may not bring this action.

Third Defense.

Defendant states that the Federal District Court does not have jurisdiction to try or hear the issues in this suit, for the reason that there was in full force and effect at
16 the time of the accident alleged herein a certain statute of the State of Illinois providing (Chapter 70 Illinois Revised Statutes, Section 2):

"* * *; provided further that no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

Defendant further states that it is qualified to do business in the State of Utah under the laws of the State of Utah and that it has registered agents available in that state for service of process upon it.

Wherefore, this defendant asks that the suit be dismissed as to it.

David Jacker,
Charles M. Rush,
Kirkland, Fleming, Green, Martin & Ellis,
*Attorneys for Defendant United Air Lines, Inc.,*
33 North La Salle Street,
RAndolph 6-2929.

Received a copy of the foregoing Answer to Complaint this 15 day of November, A. D. 1948.

Royal W. Irwin,
*Attorney for Plaintiff.*

17 And afterwards, to wit, on the 17th day of March, 1950, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

18 IN THE UNITED STATES DISTRICT COURT
(Caption—48-C-1473)

It Is Ordered by the Court that leave be and it is hereby given to the plaintiff to file any further pleadings within thirty (30) days and that this cause be and it is hereby continued generally for trial.

19 And afterwards on, to wit, the 26th day of April, 1950 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion to Strike Third Defense of Answer in words and figures following, to wit:

20 IN THE DISTRICT COURT OF THE UNITED STATES.
(Caption—48-C-1473)

MOTION TO STRIKE THIRD DEFENSE OF ANSWER.

Now comes the plaintiff, by Bishop, Mitchell and Burdett, its attorneys, and moves the court to strike the third defense contained in the Answer of United Airlines, Inc., a corporation, filed herein on November 15, 1948, and in support of said motion respectfully shows the court as follows:

1. Said third defense states that this court has no jurisdiction to try or hear the issues herein for the reason that the death complained of occurred outside of the State of Illinois, and Section 2 of the Illinois Injuries Act (Sec. 2, ch. 70, Ill. Rev. Stats.) provides that no action shall be brought or prosecuted in the State of Illinois to recover damages for death occurring outside of the State of Illinois, where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.

2. Said Section 2, chapter 70 of the Illinois Revised Statutes does not and cannot limit the jurisdiction of
21 the Federal courts;

3. Said Section 2 does not declare the policy of the State of Illinois as being against recovery in such cases, but simply denies comity to the courts of the State of Illinois to entertain such actions. Said statute cannot limit the jurisdiction of the Federal courts.

## MOTION IN THE ALTERNATIVE TO TRANSFER CASE.

In the alternative, in the event the above and foregoing Motion to Strike is not well founded in law and is overruled, the plaintiff then moves that this cause be transferred to the United States District Court, Central Division, in Salt Lake City, Utah, and in support of this alternative motion respectfully shows the court as follows:

1. That the alleged cause of action arose in the County of Garfield, State of Utah.

2. That the defendant admits by its answer that it is qualified to do business in the State of Utah, and that it has registered agents available in that State for service of process upon it.

3. That the United States District Court, Central Division, in Salt Lake City, Utah, is comprised of counties including the County of Garfield.

4. That under Section 1406, (a), Title 28, United States Code Ann., provides as follows:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

22 Wherefore, in the alternative, plaintiff prays that said cause be transferred.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,
*Attorneys for Plaintiff,*
1678 Board of Trade Building,
Chicago, Illinois,
Har. 7-3215.

Received a copy of the foregoing motion this 26th day of April, 1950.

Kirkland, Fleming, Green, Martin & Ellis, per HC
*Attorneys for Defendant.*

23 And afterwards, to-wit, on the 8th day of November, 1950, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

24 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-1473) * *

It Is Ordered by the Court that leave be and it is hereby granted to the plaintiff to file instanter an amended motion to strike the third defense of the answer.

25 And on the same day, to wit, the 8th day of November, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Amended Motion To Strike Third Defense Of Answer, And Alternative Motion To Transfer Case, in words and figures following, to-wit:

26 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-1473) * *

AMENDED MOTION TO STRIKE THIRD DEFENSE OF ANSWER, AND ALTERNATIVE MOTION TO TRANSFER CASE.

Now comes the plaintiff, by Bishop & Burdett, its attorneys, leave of court having first been duly had and obtained, and moves the court to strike the third defense contained in the Answer of United Airlines, Inc., a corporation, filed herein on November 15, 1948, and in support of said motion respectfully shows the court as follows:

1. The proviso of section 2 of the Injuries Act (Ill. Rev. Stats. 1949, ch. 70, sec. 2) is unconstitutional and void as being in violation of the single subject requirement of Section 13 of Article IV of the Constitution of 1870.

(a) Sections 1 and 2 of the chapter on injuries were enacted in 1853. Section 1 created the cause of action

for death by wrongful act. Section 2, as originally enacted, provided who should bring such action, for whose benefit the recovery was had, fixed a limit on the amount of recovery, and fixed a limitation period within which the action had to be brought.

27 The title of the enactment was and is: "An Act requiring compensation for causing death by wrongful act, neglect or default."

The single subject requirement of Section 13 of Article IV is: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The subject matter of the original two sections was clearly embodied in the title of the act noted above. The first section created the cause of action and the second section provided the details as to who should bring it, for whose benefit recovery was to be had, the amount of the recovery and the time within which the action should be brought.

Section 2 was amended in 1903 (Laws 1903, p. 217). The title of the amendatory act of 1903 was: "An Act to amend Section 2 of 'An Act requiring compensation for causing death by wrongful act, neglect or default'." This amendatory act added the proviso: "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State." It is obvious that this proviso added a new subject to that contained in the title of the enactment, namely, a denial of comity on the part of Illinois' courts of actions created by the statutes of other jurisdictions.

(b) It is also obvious that the proviso added to Section 2 a subject and contents different than those originally embraced by Section 2, namely, the denial of comity; and the Illinois cases construing the single subject requirement of its constitution hold that where the title of an amendatory act is similar to that of the 1903 amendatory act, no new provisions not already embraced in the section amended may be added thereto.

28 2. Said proviso to Section 2 of the Injuries Act is violative of the full faith and credit clause of the Federal Constitution.

3. The proviso to Section 2 of the Injuries Act can in no way affect the jurisdiction of the Federal courts.

The Illinois courts have repeatedly held that actions for wrongful death in no way violate the public policy of the State of Illinois.

All that the proviso purports to accomplish is a denial

of comity on the part of Illinois courts to actions created by statutes of other jurisdictions.

Comity is a matter of practice and procedure; and the granting or denial of comity on the part of Federal courts is not a subject where state law would control under the doctrine of *Erie* v. *Tompkins*, 304 U. S. 64.

## MOTION IN THE ALTERNATIVE TO TRANSFER CASE.

In the alternative, in the event the above and foregoing Motion to Strike is not well founded in law and is overruled, the plaintiff then moves that this cause be transferred to the United States District Court, Central Division, in Salt Lake City, Utah, and in support of this alternative motion respectfully shows the court as follows:

1. That the alleged cause of action arose in the County of Garfield, State of Utah.

2. That the defendant admits by its answer that it is qualified to do business in the State of Utah, and that it has registered agents available in that State for service of process upon it.

29 3. That the United States District Court, Central Division, in Salt Lake City, Utah, is comprised of counties including the County of Garfield.

4. That under Section 1406 (a), Title 28, United States Code Ann., provides as follows:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Wherefore, in the alternative, plaintiff prays that said cause be transferred.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,
*Attorneys for plaintiff*,
1678 Board of Trade Building,
Chicago, Illinois,
Har. 7—3215.

30 And afterwards on, to wit, the 16th day of November, 1950, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Amendment To Motion In The Alternative To Transfer Case in words and figures following, to wit:

31 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—48-C-1473)

AMENDMENT TO MOTION IN THE ALTERNATIVE TO TRANSFER CASE.

Now comes the plaintiff, by Bishop & Burdett, leave of court having first been duly had and obtained, and amends paragraph one (1) of the Motion in the Alternative to Transfer Case to read as follows:

1. That the alleged cause of action arose in the County of Garfield, State of Utah, on the 24th day of October, 1947. That the Statute of the State of Utah requires that actions for wrongful death be commenced within two years from the date on which such cause of action occurred.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,
*Attorneys for plaintiff,*
1820 Board of Trade Building,
Chicago 4, Illinois,
Ha 7—3215.

32 And afterwards, to-wit, on the 17th day of November, 1950, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

33 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-1473) * *

It Is Ordered by the Court that leave be and it is hereby granted to the plaintiff to amend the motion in the alternative to transfer this cause and it is

Further Ordered that this cause be and it is hereby continued to January 5, 1951.

34 And afterwards on, to wit, the 1st day of February, 1951, there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On January 19, 1951, Before The Honorable Philip L. Sullivan, Judge, in words and figures following, to wit:

* * * * *

36 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-1473) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before Honorable Philip L. Sullivan, one of the Judges of said Court, in his Court Room in the United States Court House, at Chicago, Illinois, on Friday, January 19, 1951.

Messrs. Bishop & Burdett, by Mr. Robert J. Burdett, appeared on behalf of the Plaintiff.

Messrs. Kirkland, Fleming, Green, Martin & Ellis, by Mr. David Jacker, appeared on behalf of the Defendant.

37 The Clerk: First National Bank of Chicago, etc. *vs.* United Air Lines.

The Court: I will give you my conclusions:

Plaintiff's motion to strike the third defense of the answer should be denied for the following reasons: (1) Neither Section 13 of Article IV of the Illinois constitution nor the Full Faith and Credit Clause of the United States Constitution are violated by Section 2 of the Illinois Death by Wrongful Act statute. A District Court will declare a state statute unconstitutional only if its invalidity is clearly apparent. Such invalidity was not proven here, and (2) Section 2 of the Illinois Death by Wrongful Act statute deprives this court of jurisdiction. (*Munch* v. *United Air Lines*, 184 F. 2d 630.) The alternative motion to transfer under Section 1406(a) of the Judicial Code should be denied for the following reasons: (1) this suit was not brought in the wrong venue, and (2) the Court does not have jurisdiction to order the transfer to Utah.

Bring in an order.

Mr. Burdett: If your Honor please, for the first time in my reply brief we argued the point at some length that a deprival of this court's jurisdiction by reason of the proviso in Section 2, the Injuries Act, raises a federal question under Article III of the Federal Constitution. Now, may I have leave to formally put that point in my motion to strike, so it will be preserved in the record? You
38 understand, sir, I say that the jurisdiction of this Court springs from Article III of the Federal Constitution; and that, therefore, it cannot be curtailed or abridged by reason of any state statute; and so your holding would involve of itself a federal question.

The Court: If you want to amend your pleading, you may; and then you can raise whatever question is to be raised by it.

The Clerk: Bring in an order.

Mr. Jacker: When should we come in on the order?

The Court: I would say a week from today.

40 And afterwards on, to wit, the 26th day of January, 1951, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Second Amended Motion To Strike Third Defense of Answer, And Alternative Motion To Transfer Case in words and figures following, to wit:

41 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—48-C-1473)

SECOND AMENDED MOTION TO STRIKE THIRD DEFENSE OF ANSWER, AND ALTERNATIVE MOTION TO TRANSFER CASE.

Now comes the plaintiff, by John H. Bishop, Robert J. Burdett and John M. Falasz of Bishop & Burdett, its attorneys, leave of court having first been duly had and obtained, and moves the court to strike the Third Defense contained in the Answer of United Airlines, Inc., a corporation, filed herein on November 15, 1948, and in support of said motion respectfully shows the Court as follows:

1. The proviso of section 2 of the Injuries Act (Ill. Rev. Stats. 1949, ch. 70, par. 2) is unconstitutional and void as being in violation of the single subject requirement of Section 13 of Article IV of the Constitution of 1870.

(a) Paragraphs 1 and 2 of the chapter on Injuries were enacted in 1853, (Ill. Rev. Stats. 1949, ch. 72, pars. 1 and 2) paragraph 1 created the cause of action for death by wrongful act. Paragraph 2, as originally en-
42 acted, provided who should bring such action, for whose benefit the recovery was had, fixed a limit on the amount of recovery, and fixed a limitation period within which the action had to be brought.

The title of the enactment was and now is: "An Act *requiring* compensation for causing death by wrongful act, neglect or default". (Italics ours.)

The single subject requirement of Section 13 of Article IV is: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The subject matter of the original two sections was clearly embodied in the title of the act noted above. That was an

Act *requiring* compensation for death by wrongful act. The first section created the cause of action and the second section provided the details as to who should bring it, for whose benefit recovery was to be had, the amount of recovery and the time within such the action should be brought.

Section 2 was amended in 1903 (Laws 1903, p. 217). The title of the amendatory act of 1903 was: "An Act to amend Section 2 of 'An Act requiring compensation for causing death by wrongful act, neglect or default'". This amendatory act added the proviso: "'Provided, further, that no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this State.'" Section 2 was again amended in 1935 (Laws 1935, p. 916) under a title the same as that of 1903. This amendatory act changed the above quoted proviso to read: "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit
43 may be had upon the defendant in such place." It is obvious that the provisos inserted in 1903 and 1935 added a new subject to the content of the title of the enactment. That title created a cause of action *requiring* compensation for wrongful death. The additions inserted by the amendments *denied* compensation for wrongful death in Illinois in such cases where the rights of action were created by sister States.

(b) It is also obvious that the provisos added to Section 2 a subject and content different than those originally embraced therein, namely, the denial of recovery; and the Illinois cases construing the single subject requirement of its constitution hold that where the title of an amendatory act is similar to that of the 1903 and 1935 amendatory acts, no new subject not already embraced in the section amended may be added thereto.

2. Said proviso to Section 2 of the Injuries Act is violative of the full faith and credit clause of the Federal Constitution (Sec. 1, Art. IV, Constitution of the United States).

(a) An action permitting recovery for wrongful death in no way violates Illinois' policy. By its own statute, Illinois has created such a right of action. Therefore,

Illinois has no governmental interest to prevent the enforcement of such a right of action created by the laws of a sister state, and the proviso denying access to Illinois' courts is void under the full faith and credit clause.

3. Said proviso to Section 2 of the Injuries Act can in no way affect the jurisdiction of the Federal District Court.

44 (a) Denial of jurisdiction is a matter of practice and procedure—adjective law—and the granting or denial of jurisdiction on the part of Federal Courts is not a subject which State law may control under the doctrine of *Erie* v. *Tompkins*, 304 U. S. 64.

(b) A construction of the doctrine of *Erie* v. *Tompkins* which makes the proviso of Section 2 of the Injuries Act deprive the Federal District Court of jurisdiction in this case, is in violation of Article III of the Constitution of the United States. That Article of the Constitution (Sec. 2) creates power in Congress to grant jurisdiction in diversity cases to the District Court. Congress has conferred such jurisdiction in pursuance of such constitutional authority. Therefore, such jurisdiction exists 'by the supreme law of the land', and it cannot be cut down, abridged or destroyed by any statute of any State.

## MOTION IN THE ALTERNATIVE TO TRANSFER CASE.

In the alternative, in the event the above and foregoing Motion to Strike is held to be not well founded in law and is overruled, the plaintiff then moves that this cause be transferred to the United States District Court, Central Division, in Salt Lake City, Utah, and in support of this alternative motion respectfully shows the Court as follows:

1. That the alleged cause of action arose in the County of Garfield, State of Utah, on the 24th day of October, 1947. That the Statute of the State of Utah requires that actions for wrongful death be commenced within two years from the date on which such cause of action occurred.

2. That the defendant admits by its answer that it is qualified to do business in the State of Utah, and that it has registered agents available in that State of
45 service of process upon it.

3. That the United States District Court, Central

Division, in Salt Lake City, Utah, is comprised of counties including the County of Garfield.

4. That Section 1406 (a), Title 28, United States Code Ann., provides as follows:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Wherefore, in the alternative, plaintiff prays that said cause be transferred.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,
*Attorneys for Plaintiff,*
1820 Board of Trade Building,
Chicago 4, Illinois,
Har 7-3215.

46 And on the same day, to wit, on the 26th day of January, 1951, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

47 In the District Court of the United States.

* * (Caption—48-C-1473) * *

## JUDGMENT ORDER.

On motion of plaintiff, First National Bank of Chicago, Executor of the Estate of John Louis Nelson, deceased, and due notice having been given:

It Is Ordered that leave be and the same is hereby granted said Plaintiff to file instanter its Second Amended Motion to Strike the Third Defense of the Answer of Defendant, United Air Lines, Inc., and to raise by said second amended motion to strike the contention that if the proviso to Section 2 of the Injuries Act of Illinois (Ill. Rev. Stats., 1949, ch. 70, par. 2), denying jurisdiction to Illinois Courts to entertain actions for foreign deaths,

has the effect of depriving this Court of jurisdiction to entertain this action, then such effect is in violation of Article III of the Constitution of the United States.

And this cause now coming on to be heard upon said Second Amended Motion to Strike the Third Defense of Defendant's Answer and the Alternative Motion to Transfer this case under Section 1406 (a) of the Judicial
48 Code (Sec. 1406 (a), Tit. 28, U. S. C. A.), and the Court being fully advised in the premises, Doth Find as follows as matters of law:

1. The proviso to Section 2 of the Injuries Act (Ill. Rev. Stats. 1949, ch. 70, par. 2) denying jurisdiction to Illinois Courts to entertain or hear actions for foreign deaths does not violate the single subject requirement of Section 13 of Article IV of the Illinois Constitution of 1870;

2. Said proviso to Section 2 of the Injuries Act does not violate the full faith and credit clause of the Federal Constitution (Sec. 1, Art. IV, Constitution of the United States);

3. Said proviso to Section 2 of the Injuries Act deprives this Court of jurisdiction to entertain or hear this action and such deprivation of the jurisdiction of this Court does not violate Article III of the Constitution of the United States;

4. This suit was not brought in the wrong venue within the meaning of Section 1406 (a) of the Judicial Code;

5. This Court, not having jurisdiction of this cause of action, no transfer to Utah can be made; under the provisions of Section 1406 (a) of the Judicial Code;

6. This Court, not having jurisdiction of this cause of action, has no power to order transfer to Utah under the provisions of Section 1406 (a) of the Judicial Code.

It Is Therefore Ordered that Plaintiff's Second Amended Motion to Strike the Third Defense of Defendant's Answer be and the same is in all respects overruled for the reasons set forth in findings 1, 2 and 3 above;

It Is Further Ordered that Plaintiff's alternative motion to transfer this cause to the United States District Court, Central Division, at Salt Lake City, Utah, be and the
49 same is denied for the reasons set forth in findings 4, 5 and 6 above.

And the Plaintiff declining to plead further, and thereby admitting the allegations of fact contained in said Third Defense;

It Is Ordered that this case be and the same is hereby dismissed at Plaintiff's costs and that Plaintiff take nothing by its suit against defendant, United Air Lines, Inc.

Enter:

Philip L. Sullivan,
*Judge.*

50 And on the same day, to wit, the 26th day of January, 1951 came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal and Bond on Appeal in words and figures following, to wit:

51 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased,
*Plaintiff-Appellant,*
*vs.*
United Air Lines, Inc., a corporation,
*Defendant-Appellee.*
} No. 48 C 1473.

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

To: David Jacker, Charles M. Rush, John M. O'Connor, Jr., of Kirkland, Fleming, Green, Martin & Ellis,
33 North La Salle Street,
Chicago 2, Illinois.
Attorneys for Defendant-Appellee.

Notice is hereby given you that The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, plaintiff-appellant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment order entered against the plaintiff in this action on January 26, 1951.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,
of Bishop and Burdett,
*Attorneys for Plaintiff-Appellant.*

Dated this 26th day of January, 1951.

Received a copy of the foregoing notice of appeal this 26th day of January, 1951.

David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.
of Kirkland, Fleming, Green, Martin & Ellis,
*Attorneys for defendant-appellee.*

(Certificate of Mailing Attached Hereto):

52 United States of America,
Northern District of Illinois. } ss:

The First National Bank of Chicago, etc.,
*vs.*
United Air Lines, Inc. } No. 48 C 1473.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on January 26, 1951, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Kirkland, Fleming, Green, Martin & Ellis, 33 N. La Salle St., Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 26th day of January, 1951.

Roy H. Johnson,
(Seal) *Clerk.*
By Gizella Butcher,
*Deputy Clerk.*

53 Know all Men by these Presents:

That we, The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, as principal, and ..... as sureties, are held and firmly bound unto United Air Lines, Inc., in the full and just sum of Two Hundred Fifty Dollars to be paid to the said United Air Lines, Inc., attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 26th day of January in the year of our Lord one thousand nine hundred and Fifty-one.

Whereas, lately at a session of the United States District Court for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, and the United Air Lines, Inc., a judgment was rendered against The First National Bank

of Chicago, Executor of the Estate of John Louis Nelson, Deceased and the said The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, having filed in the Clerk's Office of the said District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, to reverse the judgment of the aforesaid suit, in the United States Court of Appeals for the Seventh Circuit, to be holden at Chicago within forty (40) days from the date hereof

Now, the condition of the above obligation is such, that if the said First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, shall pay the cost if the appeal is dismissed or the judgment affirmed, or pay such costs as the appellate court may award if the judgment is modified then the above obligation to be void; otherwise to remain in full force and virtue.

The First National Bank of Chicago,
Executor of the Estate of John
Louis Nelson, Deceased,
By B. B. Manchester,
(Seal) *Assistant Trust Officer.*

Sealed and delivered in presence of:
W. M. Doherty.

United States Fidelity and Guaranty Co.,
By D. T. Harper,
(Seal) *Attorney-in-Fact.*

Approved by:

.....

.....

(Power of Attorney Attached But Not Copied.)

54 And on the same day, to wit, the 31st day of January, 1951, came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points in words and figures following, to wit:

55 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—48-C-1473)

## STATEMENT OF POINTS.

The plaintiff-appellant, The First National Bank of Chicago, as executor of the Estate of John Louis Nelson, deceased, proposes on its appeal to the United States Court of Appeals for the Seventh Circuit, to rely upon the following points as error:

1. The Court erred in finding the proviso to Section 2 of the Injuries Act (Ill. Rev. Stats. 1949, Ch. 70, Par. 2), creating a jurisdictional bar as to Illinois Courts, does not contravene the single subject requirement of Section 13 of Article IV of the Illinois Constitution of 1870.

2. The Court erred in finding that said proviso to Section 2 of the Injuries Act does not contravene the full faith and credit clause of the Federal Constitution (Sec. 1, Article IV, Constitution of the United States).

3. The Court erred in finding that said proviso to Section 2 of the Injuries Act deprived it of jurisdiction to entertain or hear this action and that such deprivation of jurisdiction does not violate Article III of the Constitution of the United States.

4. The Court erred in overruling the Plaintiff's
56 Second Amended Motion to Strike the Third Defense of Defendant's Answer.

5. The Court erred in denying Plaintiff's Alternative Motion to transfer this cause to the United States Court, Central Division, at Salt Lake City, Utah.

6. The Court erred in entering judgment for Defendant.

John H. Bishop,
Robert J. Burdett,
John Falasz,
of Bishop and Burdett,
*Attorneys for Appellant,*
141 West Jackson Blvd.,
HArrison 7-3215.

Received copy of the foregoing statement of points on which the appellant intends to rely on appeal this 31 day of January, A. D. 1951.

David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.,
*Attorneys for Defendants.*

57 And afterwards on, to wit, the 31st day of January, 1951, came the Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation of Contents of Record on Appeal in words and figures following, to wit:

58 IN THE UNITED STATES DISTRICT COURT.
(Caption—48-C-1473)

## DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Applicant, The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, deceased, plaintiff in the above entitled action, hereby requests the Clerk to prepare a record of proceedings in the above cause to be presented on appeal to the United States Court of Appeals for the Seventh Circuit, and designates the following to be inserted in that record:

1. Complaint.
2. Summons.
3. Appearance of defendant.
4. Answer of defendant.
5. Order of Court entered March 17, 1950, granting leave to plaintiff to file further pleadings.
6. Motion of plaintiff to strike the third defense of defendant's answer and in the alternative to transfer the cause.
7. Order of court entered on November 8, 1950 granting leave to plaintiff to file instanter an amendment to motion to strike third defense of defendant's answer and in the alternative to transfer the cause.

59 8. Amendment to motion to strike third defense of defendant's answer and in the alternative to transfer the cause.

9. Order of Court entered November 17, 1950, granting leave to plaintiff to file amended motion to strike third defense of defendant's answer and in the alternative to transfer cause.
10. Amended motion to strike third defense of defendant's answer and in the alternative to transfer cause.
11. Order of Court entered January 26, 1951, giving leave to plaintiff to file second amended motion to strike the

third defense of defendant's answer and in the alternative to transfer cause, which order further denies said motion to strike and to transfer and enters judgment for defendant.

12. Second amended motion to strike third defense of defendant's answer, and in the alternative to transfer said cause, filed January 26, 1951.

13. Plaintiff's notice of appeal and certificate of Clerk of mailing same to defendant.

14. Plaintiff's appeal bond.

15. Designation of contents of record on appeal.

16. Statement pursuant to rule 10 (b) of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit.

17. Statement of points on which appellant intends to rely on appeal.

18. Stenographic report of proceedings before the Hon. Judge Sullivan taken on hearing on January 19, 1951.

John H. Bishop,
Robert J. Burdett,
John Falasz,
Of Bishop & Burdett,
*Attorneys for the First National Bank of Chicago, Executor of the Estate of John Louis Nelson, deceased, plaintiff-appellant,*
141 West Jackson Blvd.,
Ha 7—3215.

Received a copy of the foregoing Designation of Contents of Record on Appeal this 31st day of January, 1951.

David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.,
Of Kirkland, Fleming, Green, Martin & Ellis,
*Attorneys for defendant-appellee.*

60 And afterwards on, to wit, the 1st day of February, 1951, came the Appellee by its attorneys and filed in the Clerk's office of said Court its certain Appearance in words and figures following, to wit:

61 IN THE UNITED STATES DISTRICT COURT.

(Caption—48-C-1473)

## APPEARANCE.

Now comes United Air Lines, Inc., a corporation, and, in compliance with Rule 10(c) of the Rules of the United States Court of Appeals for the Seventh Circuit, states that it is the appellee in the above entitled cause and that its attorneys are David Jacker, Charles M. Rush and John M. O'Connor, Jr., of Kirkland, Fleming, Green, Martin & Ellis, 33 North La Salle Street, Chicago 2, Illinois, Randolph 6—2929.

United Air Lines, Inc., a corporation,
By David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.,
Of Kirkland, Fleming, Green
Martin & Ellis.

62 United States of America, }
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed by the Plaintiff-Appellant, in this Court in the cause entitled: The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, Plaintiff *vs.* United Air Lines, Inc., a corporation, No. 48-C-1473, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 2nd day of February, 1950.

Roy H. Johnson,
*Clerk.*
By Gizella Butcher,
*Deputy Clerk.*

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

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I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed February 8, 1951, in:

Cause No. 10,337

The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased,
*Plaintiff-Appellant,*

*vs.*

United Air Lines, Inc., a Corporation,
*Defendant-Appellee,*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 16th day of February, A. D. 1951.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the third day of October, in the year of our Lord, one thousand nine hundred and fifty, and of our Independence the one hundred seventy-fifth:

| | | |
|---|---|---|
| The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, *Plaintiff-Appellant,* | | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |
| 10,337 | *vs.* | |
| United Air Lines, Inc., a Corporation, *Defendant-Appellee.* | | |

And afterward, to-wit, on the seventh day of February, 1951, there was filed in the office of the Clerk of this Court an Appearance of Counsel for the Appellant, which said Appearance is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

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Cause No. 10,337.

The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased,
*Plaintiff-Appellant,*

*vs.*

United Air Lines, Inc.,
*Defendant-Appellee.*

The Clerk will enter our appearance as counsel for Appellant.

Robert J. Burdett,
141 W. Jackson Blvd.,
Chicago, Illinois.

John H. Bishop,
141 W. Jackson Blvd.,
Chicago, Illinois.

John Falasz,
141 W. Jackson Blvd.,
Chicago, Illinois.

Endorsed: Filed February 7, 1951. Kenneth J. Garrick, Clerk.

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And on the same day, to-wit, on the seventh day of February, 1951, there was filed in the office of the Clerk of this Court an Appearance of Counsel for the Appellee, which said Appearance is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

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Cause No. 10,337.

The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased,
*Plaintiff-Appellant,*

*vs.*

United Air Lines, Inc.,
*Defendant-Appellee.*

The Clerk will enter our appearance as counsel for Appellee.

David Jacker,
33 N. La Salle Street,
Chicago, Illinois.

Charles M. Rush,
33 N. La Salle Street,
Chicago, Illinois.

John M. O'Connor, Jr.,
33 N. La Salle Street,
Chicago, Illinois.

Endorsed: Filed February 7, 1951. Kenneth J. Carrick, Clerk.

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And afterwards, to-wit, on the ninth day of February, 1951, there was filed in the office of the Clerk of this Court a Designation of Record, which said Designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

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No. 10,337.

| | |
|---|---|
| The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, *Plaintiff-Appellant,* *vs.* United Air Lines, Inc., a Corporation, *Defendant-Appellee.* | Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. |

## DESIGNATION OF RECORD.

To: Hon. Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, 1212 Lake Shore Drive, Chicago, Illinois:

The undersigned requests you to make a transcript to be filed as the record on petition for writ of certiorari in the United States Supreme Court consisting of all docket entries, all papers filed, and all proceedings had in the above entitled case.

Dated at Chicago, Illinois, this 9th day of February, 1951.

John N. Bishop,
Robert J. Burdett,
John M. Faiasz,
Of Bishop & Burdett,
*Attorneys for the First National Bank, of Chicago, Executor of the Estate of John Louis Nelson, deceased, Plaintiff-Appellant,*
141 West Jackson Blvd.,
Ha 7-3215.

Received a copy of the foregoing Designation of Record this 9th day of February, 1951.

David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.,
Of Kirkland, Fleming, Green, Martin & Ellis;
*Attorneys for Defendant-Appellee.*

Endorsed: Filed February 9, 1951. Kenneth J. Carrick, Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

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I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and proceedings had, made in accordance with the designation of record, filed February 9, 1951, in:

Cause No. 10,337

The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased,
*Plaintiff-Appellant,*

*vs.*

United Air Lines, Inc., a Corporation,
*Defendant-Appellee,*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 16th day of February, A. D. 1951.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

And afterward, to-wit on the thirteenth day of April, 1951, there was filed in the office of the Clerk of this Court a certified copy of Supreme Court order denying a petition for a Writ of Certiorari, which said order is in the words and figures following, to-wit:

SUPREME COURT OF THE UNITED STATES.

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No. 558—October Term, 1950.

First National Bank of Chicago, as Executor of the Estate of John Louis Nelson, deceased,
*Petitioner,*

*vs.*

United Air Lines, Inc., a corporation.

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On petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Court of Appeals for the Seventh Circuit, it is ordered by this Court that the said petition be, and the same is hereby, denied.

April 9, 1951.

A true copy
Test:
Charles Elmore Cropley,
*Clerk of the Supreme Court of the United States,*
By Hugh W. Barr,
(Seal) *Deputy.*

Endorsed: Filed Apr. 13, 1951. Kenneth J. Carrick, Clerk.

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And afterward, to-wit, on the fifth day of July, 1951, there was filed in the office of the Clerk of this Court the opinion of the Court which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 103337. October Term, 1950, April Session, 1951.

The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, *Plaintiff-Appellant*, *vs.* United Air Lines, Inc., a Corporation, *Defendant-Appellee.* } Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 5, 1951.

Before KERNER, FINNEGAN, and LINDLEY, *Circuit Judges.*

*Per Curiam.* This is an appeal from a summary judgment dismissing an action brought by plaintiff against defendant to recover damages for the death of plaintiff's testate, because of his wrongful death while a passenger aboard one of defendant's airliners which crashed on October 24, 1947, at Bryce Canyon, Utah. Jurisdiction is based on diversity of citizenship and amount in controversy. Plaintiff's testate prior to his death was a resident and citizen of Illinois. Defendant is a Delaware corporation whose principal office is located at Chicago, Illinois, but it is qualified to do business in the state of Utah and has registered agents available in that state for service of process upon it. The action was brought under the Utah wrongful death statute. Section 104-3-11, U.C.A. 1943.

Defendant answered the complaint and moved for summary judgment on the ground that ch. 70, §2 of the Ill. Rev.

St. operated as a bar to the maintenance of the action in Illinois. That section provides: "* * * that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

In answer to defendant's motion, plaintiff contended, *inter alia*, that the Illinois statute could not limit the jurisdiction of the federal courts, even though service of process could be had upon the defendant in Utah, and argued that to hold that it did would violate the full faith and credit clause of Art. IV, §1 of the United States Constitution. The trial judge held the Illinois statute deprived the District Court of jurisdiction and that the full faith and credit clause of the Constitution had not been violated.

This court has already held that the provisions of the Illinois statute were binding on the federal courts in Illinois, and constituted a bar to the maintenance of an action for damages for wrongful death in an action where, as here, a right of action for such death exists under the laws of the state where the death occurred. *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640, and *Munch* v. *United Air Lines*, 184 F. 2d 630. But in those cases no contention was made, that the Illinois statute violated Art. IV, §1 of the United States Constitution.

In this court plaintiff renews its contention and cites *Hughes* v. *Fetter*, 341 U. S. ....., decided June 4, 1951, which it says is conclusive on the question presented on this appeal. In that case appellant brought his action in a Wisconsin state court to recover for the death of his intestate in Illinois. He based his complaint on the Illinois wrongful death statute. The trial court held appellant's action was barred in Wisconsin because the Wisconsin statute created a right of action only for a death caused in that state. The Wisconsin Supreme Court affirmed, 257 Wis. 35. The United States Supreme Court, although reaffirming the principle that "full faith and credit does not automatically compel a forum state to subordinate its own statutory policy," recognized that there is a conflict of policies which requires that one be accepted and the other rejected, and held that Wisconsin's expressed statutory policy against permitting Wisconsin courts to entertain foreign wrongful death actions was in the face of and contrary to the natural policy embodied in the full faith and credit clause of the Constitution.

The fact that the absolute bar to the action in the Wisconsin courts might result in the total extinguishment of the cause of action because of the practical difficulties of service of process in Illinois apparently influenced the majority to tip the scales in favor of accepting the full faith and credit policy as against the right of Wisconsin to close its courts to causes of action for wrongful death arising out of the state.

In our case no such compelling reason appears. The Illinois statute, as we have already observed, differs substantially from the Wisconsin statute in that it does not, without exception, exclude all foreign wrongful death actions but only those as to which "a right of action * * * exists under the laws of the place where such death occurred and service of process * * * may be had upon the defendant in such place." Thus, it seems clear that whereas the Wisconsin statute constituted an absolute and unconditional refusal on the part of that state to enforce in its courts the wrongful death statutes of sister states, the Illinois act recognizes the existence and enforcibility of the right of action created by such statutes and authorizes the courts of Illinois to entertain such actions, except in cases where they are capable of being prosecuted to judgment in the courts of the state which created them. Whether the Illinois statute and the policy reflected thereby—a policy which appears to be based on considerations not unlike those responsible for the application of the doctrine of *forum non conveniens* in the federal courts—offend against the Constitution's full faith and credit clause is the crucial question presented on this appeal. Its solution can not, it seems to us, be found in the disposition of a case in which the court observed that the statute held unconstitutional could not be regarded as "an application of the *forum non conveniens* doctrine" and went on to point out that the proscribed legislation might result in "a deprivation of all opportunity to enforce valid death claims created by another state,"—a result which can never obtain under the terms of the Illinois statute.

In the light of the Supreme Court's repeated declaration that "the full faith and credit clause is not an inexorable and unqualified command" and that, consistently with its proper application, "there are limits to the extent to which the laws and policy of one state may be subordinated to those of another," *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, 210-211; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U. S. 532, 546, 547; *Pacific Employers*

*Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493, 501; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 498; *Williams* v. *North Carolina*, 317 U. S. 287, 302, the constitutionality of the Illinois act would seem to us to be dependent on the reasonableness of the conditions it establishes for the maintenance, in the courts of Illinois, of an action arising under the wrongful death statute of a sister state, i.e., on whether the statute is "a permissible limitation on the full faith and credit clause," *Williams* v. *North Carolina*, 317 U. S. 287, 302; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U. S. 532, 546-547, rather than on the fact that a statute which unconditionally excludes all actions based on foreign statutes has been held to violate that clause.

While it is true, as plaintiff argues, that the Illinois statute is not expressive of a policy against wrongful death suits in general, it is clearly an expression of a public policy against permitting Illinois courts to entertain any wrongful death suit which is capable of reduction to judgment in a forum of the state under whose laws it arose. We can not believe that this policy is violative of the constitutional requirement of full faith and credit. On the contrary, it recognizes the validity and enforcibility of the wrongful death statutes of sister states, and provides for their enforcement in the courts of Illinois in the event they can not be enforced in the courts of the state which enacted them. It is hardly to be doubted that the Illinois statute, in tending to regulate and reduce the case load of the Illinois courts, tends to promote the prompt and orderly administration of justice in those courts, which is, undeniably, a matter of vital and legitimate concern to that state. Consequently, since "*Prima facie* every state is entitled to enforce in its own courts its own statutes" and "One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum," *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U. S. 532, 547-548, it becomes necessary to inquire whether Utah's interest in having its statute enforced in Illinois in a case where it is capable of enforcement in Utah can be said to be superior to Illinois' interest in having its courts free to try cases arising in and under the laws of Illinois without the added burden of trying cases arising in and under the laws of a sister state and triable therein. It seems to us that it can

not. Therefore, we hold that the Illinois statute involved in the instant case is permissible legislation under the full faith and credit clause and expressive of a public policy of Illinois not inconsistent with the proper application of that clause.

Plaintiff's next contention is that the 1935 amendment to the Illinois statute under consideration, which added the proviso limiting the wrongful death jurisdiction of the Illinois courts, violates the single-subject requirement of Art. IV of §13 of the Illinois Constitution. We think this contention is without merit.

In *Michaels* v. *Hill*, 328 Ill. 11, 15-16, it was said: "All doubts or uncertainty arising from the language of the constitution or of the act must be resolved in favor of the validity of the act, and the court will assume to declare it void only in case of a clear conflict with the constitution. It is the duty of the court to so construe acts of the legislature as to uphold their constitutionality if such can reasonably be done. If their construction is doubtful the doubt is to be resolved in favor of the law. * * * To render an act or a portion thereof void as not embraced in the title it must be seen that it is incongruous with or has no proper connection with or relation to the title. If by any fair construction the provisions of such act have a necessary or proper connection with or relation to the title it is not open to this objection. * * * The word 'subject,' as used in the constitution, signifies 'the matter or thing forming the groundwork.' It may contain many parts which grow out of it and are germane to it, and which, if traced back, will lead the mind to it as the generic head. * * * It is not required that the title of an act be so worded as to form an index to all the provisions contained therein, and mere mentioning in the title of related particulars is not a stating of a plurality of subjects."

Our statute is entitled "An Act requiring compensation for causing death by wrongful act, neglect or default"; certainly the proviso setting forth the circumstances under which an action may be maintained relates to this subject matter.

Finally we pause to consider plaintiff's contention that the court erred in not sustaining its motion to transfer the case to the District Court in Utah pursuant to §1406(a) of the Judicial Code, 28 U.S.C. §1406(a). This section applies only when a case has been filed in the wrong venue. *Orr* v. *United States*, 174 F. 2d 577, 580. Compare *Riley* v. *Union*

*Pac. R. Co.*, 177 F. 2d 673, and *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640, 646. Unfortunately here the District Court had no jurisdiction of the subject matter, hence it had no power to transfer the case to another court.

For the reasons stated, the judgment of the District Court must be affirmed. It is so ordered.

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And on the same day, to-wit, on the fifth day of July, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

---

Thursday, July 5, 1951.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

| | |
|---|---|
| First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, *Plaintiff-Appellant*, vs. United Air Lines, Inc., a Corporation, *Defendant-Appellee.* | Appeal from the United States District Court for the Northern District of Illinois Eastern Division. |

No. 10337

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs.

---

And afterward, to-wit, on the eighteenth day of August, 1951, there was filed in the office of the Clerk of this Court a designation of record which said designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

---

No. 10337.

| | |
|---|---|
| The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased, *Plaintiff-Appellant,* *vs.* United Air Lines, Inc., a Corporation, *Defendant-Appellee.* | Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. |

DESIGNATION OF RECORD.

To: Hon. Kenneth J. Carrick,
Clerk of United States Court of Appeals for the Seventh Circuit,
1212 Lake Shore Drive,
Chicago 10, Illinois.

The undersigned request you to make a transcript to be filed as the record on petition for writ of certiorari to the United States Supreme Court consisting of all docket entries, all papers filed, and all proceedings had in the above entitled case, including the following:

1. The printed record in said case.
2. Certified copy of the order of the Supreme Court denying certiorari.
3. Opinion of the Court of Appeals.

4. Judgment of the Court of Appeals.

Dated at Chicago, Illinois, this 16th day of August, 1951.

John H. Bishop,
Robert J. Burdett,
John M. Falasz,
Of Bishop & Burdett,
*Attorneys for the First National Bank of Chicago, Executor of the Estate of John Louis Nelson, deceased, plaintiff-appellant,*
141 West Jackson Blvd. Ha-7-3215.

Received a copy of the foregoing Designation of Record this 16th day of August, 1951.

Kirkland, Fleming, Green, Martin & Ellis,
David Jacker,
Charles M. Rush,
John M. O'Connor, Jr.,
Of Kirkland, Fleming, Green, Martin & Ellis,
*Attorneys for defendant-appellee.*

Endorsed: Filed August 18, 1951. Kenneth J. Carrick, Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

---

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and the proceedings had, made in accordance with the designation of record, filed August 18, 1951, in:

Cause No. 10337.

The First National Bank of Chicago, Executor of the Estate of John Louis Nelson, Deceased,
*Plaintiff-Appellant,*

*vs.*

United Air Lines, Inc., a Corporation,
*Defendant-Appellee,*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 24th day of August A. D. 1951.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of Appeals for the Seventh Circuit.*

[fol. 55] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 349

FIRST NATIONAL BANK OF CHICAGO, as Executor of the Estate of John Louis Nelson, Deceased, Petitioner,

vs.

UNITED AIR LINES, INC.

ORDER ALLOWING CERTIORARI—Filed November 13, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 349

FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,
*Petitioner,*

*vs.*

UNITED AIR LINES, INC., A CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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SYNOPSIS OF ARGUMENT:

I. It is implicit in the Full Faith and Credit Clause that each State will make available a forum for foreign actions, recognition of which is compelled by that provision of the Constitution. If a State bars foreign actions, it is for this Court to look behind the statute and determine whether the motive or justifica-

tion for such bar is based upon considerations antagonistic to local governmental interests, or abhorrent to local concepts of morality. The justification for the instant statute is simply to reduce the case load of the local courts. This in no way impairs local sovereignty. On the contrary, it is in direct conflict with the obligation imposed by the Full Faith and Credit Clause to provide a forum to hear actions arising under the public acts of sister States ..... 12-18

II. A. 1. The decisions below hold that the Illinois statute divested Federal courts sitting in Illinois of power to entertain actions for wrongful death arising in other States. Such holdings are contrary to the uniform and unbroken decisions of this Court to the effect that no State action can in any way limit, abridge or destroy Federal jurisdiction conferred by Congress under the grant of judicial power contained in Article III of the Federal Constitution. Article III was a clear grant of authority to establish Federal courts, and to confer on them jurisdiction in diversity cases. Congress having created inferior Federal courts, and conferred upon them jurisdiction in diversity cases, it would seem clear that any impairment of such jurisdiction on the part of the States would be in violation of Article III of the Federal Constitution ..... 18-23

2. Article III grants judicial power in all cases arising under the Constitution and the laws of the United States. Jurisdiction of the Federal court in diversity cases springs from the judicial power granted by Article III and is conferred by Congress pursuant to such author-

ity. Therefore, it would seem that if the question of jurisdiction of a Federal court in a diversity case arises, the determination of that question would be a Federal question, and one to which the doctrine of *Erie* v. *Tompkins*, 304 U. S. 64, can have no application. If the doctrine of Erie v. Tompkins permitted State law to determine Federal jurisdiction, that would be violative of Article III.....23, 24

B. 1. The Court of Appeals below held that the Illinois statute involved here was enacted "to regulate and reduce the case load of the Illinois courts." Impairment of the power to hear the controversy, as distinguished from the duty as to how it should be determined, is a matter of remedy and of practice and procedure, to which the doctrine of *Erie* v. *Tompkins*, 304 U. S. 64, does not apply.....24-26

2. *Angel* v. *Bullington*, 330 U. S. 183, did not decide that a State statute could in any way impair jurisdiction of a Federal Court. What that case did decide was that a Federal Court, sitting in a diversity case, was bound to apply the local rules of comity to a foreign action which was abhorrent to the local policy. In doing so the local policy supplies a defense or substantive bar to the foreign action, but does not impair the jurisdiction, the power of the Federal Court to entertain the controversy. The area in which local policy can supply a bar to a foreign action is cut down by the Federal Constitution. The Full Faith and Credit Clause abolished in large measure the general principle of international law by which local policy is permitted to dominate the rules

of comity. If the local policy is justified under the Full Faith and Credit Clause, that policy could be aptly expressed by a statute barring jurisdiction of local courts to hear and entertain actions deemed abhorrent to local concepts of morality or against local governmental interests. But the fact that the policy is so expressed does not divest the jurisdiction of the Federal court sitting in a diversity case, but simply supplies a defense to the action, because the Federal court borrows the local policy under the doctrine of Erie v. Tompkins in applying the local rule as to conflict of laws ..... 26-28

3(a) The doctrine of Erie v. Tompkins is the very antithesis of constitutionally conferred judicial power under Article III. The right of States under Erie v. Tompkins to make or expound law, not involving Federal questions, is a reserved power not granted by Article III. Article III is a grant of judicial power, and includes the right to confer jurisdiction in diversity cases. It seems fundamental that the granted power cannot usurp the reserved power. And it seems equally fundamental that the reserved power cannot affect the granted power ..... 28, 29

(b) The use of the phrase "diversity jurisdiction" in both *Angel v. Bullington*, 330 U. S. 183, and *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, in a context where local statutes were involved barring the jurisdiction of local courts, led the Court below to the conclusion it reached that the Illinois statute here could divest the Federal Court of jurisdiction. The

use of that phrase in those cases was employed to differentiate instances in which a State-created right of action was involved, from those in which a Federal question was involved. One reading those cases, however, where the phrase was used in applying the doctrine of Erie v. Tompkins to cases involving local statutes barring jurisdiction of local courts, would be prone to reach the conclusion that application of that doctrine could cause a State statute to bar jurisdiction conferred on a Federal court under the authority of Article III.....29, 30

III. 1. Section 1406 (a), 28 U. S. C. A. provides that a District Court in which is filed a case laying venue in the wrong district shall, if it be in the interest of justice, transfer the case to any district in which it could have been brought. The Federal statute has been twice construed by the Second Circuit to be remedial and to merit a liberal construction.....30, 31

2. If the District Court did not have jurisdiction in the instant case, Section 1406 (a) provided machinery to transfer the cause to Utah. *Herb* v. *Pitcairn*, 325 U. S. 77, is authority for the transfer of the case to Utah, even though the statute of limitations had run....31, 32

3. If the Illinois statute is not counter to the Full Faith and Credit Clause, nevertheless it is clear under point II of this brief that the Illinois statute did not deprive the Federal Court of jurisdiction. Under such circumtances there was power in the District Court to transfer the cause to Utah. Illinois would be an improper venue, because of the peculiar local policy expressed by the Illinois statute.. 32

4. If both the Full Faith and Credit and the jurisdictional points, I and II above, are not well taken, the result will deprive the petitioner of substantial damages for the family of the decedent. This furnishes a proper motive to search for some machinery or procedure to obviate that injustice. The Second Circuit has indicated that section 1406 (a) is a remedial statute to prevent injustice. Under such circumstances it supplies machinery whereby this and other like cases can be transferred to the proper venue "in the interest of justice." ..... 32, 33

IV. The Illinois Injuries Act, enacted in 1853, has the title, "An Act requiring compensation for causing death by wrongful act, neglect or default." The first section created the cause of action, and the second section provided who was to bring it, for whose benefit recovery was had, a limit on the amount of recovery, and the time within which the action should be brought. The provisos of 1903 and of 1935 each bore the title, "An Act to amend Section 2 of 'An Act requiring compensation for causing death by wrongful act, neglect or default'." The single subject provision of Section 13 of Article IV of the Illinois Constitution of 1870 provides that no act shall embrace more than one subject, and that shall be expressed in the title. The addition of the provisos of 1903 and of 1935 brought into the enactment a subject not embraced in its title, but entirely foreign to its title. An Illinois statute requiring compensation for wrongful death can have no bearing on a foreign action for wrongful death, since the local statute can have no extra-ter-

ritorial effect. An Act requiring compensation for causing wrongful death in Illinois does not embrace a subject which denies jurisdiction of local courts to entertain foreign actions. The Illinois cases clearly demonstrate that the addition of these provisos was a violation of the single subject provision of its constitution. Moreover, the single subject provision of the Illinois Constitution has been construed to limit the subjects which may be added to a section of a prior enactment where the title is such as those which the 1903 and 1935 amendments bore to those subjects originally in the section amended. That title was, "An Act to amend Section 2 of 'An Act requiring compensation for causing death by wrongful act, neglect or default'." Originally, Section 2 provided who was to bring the action, for whose benefit recovery was to be had, the permitted amount of recovery, and the time within which the action must be brought. Any of these subjects could have been changed by an amendatory act having a title such as those here; but under such a title there could not be added to Section 2 an entirely new subject, namely, one that deprived the Illinois courts of jurisdiction to hear foreign actions for wrongful death.....33-35

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. .....

FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,
*Petitioner,*

*vs.*

UNITED AIR LINES, INC., A CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

### Summary and Short Statement of the Matter Involved.

Important Federal questions are involved here:

IS NOT A STATE STATUTE CREATING AN ACTION FOR WRONGFUL DEATH, BUT WHICH DEPRIVES LOCAL COURTS OF JURISDICTION TO HEAR LIKE ACTIONS CREATED BY SISTER STATES WHERE SERVICE OF PROCESS MAY BE HAD WHERE THE ACTION AROSE, VIOLATIVE OF THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION?

IF THE REASON FOR DENIAL OF JURISDICTION IS NOT BECAUSE OF ANTAGONISM TO SUCH ACTIONS, BUT SIMPLY TO REDUCE THE CASE LOAD OF LOCAL COURTS, IS THE POLICY DENYING LOCAL JURISDICTION SUFFICIENT TO OVERCOME THE STRONG UNIFYING PRINCIPLE EMBODIED IN THE FULL FAITH AND CREDIT CLAUSE LOOKING TOWARD MAXIMUM ENFORCEMENT IN EACH STATE OF THE OBLIGATIONS OR RIGHTS CREATED OR RECOGNIZED BY THE STATUTES OF SISTER STATES?

WHERE DENIAL OF JURISDICTION TO LOCAL COURTS TO HEAR AND DETERMINE ACTIONS CREATED BY LAWS OF SISTER STATES IS NOT BECAUSE OF ANTAGONISM TOWARDS SUCH ACTIONS, BUT RATHER TO REDUCE THE CASE LOAD OF THE LOCAL COURTS, MAY SUCH STATUTE HAVE THE EFFECT UNDER *ERIE* V. *TOMPKINS* TO DEPRIVE FEDERAL COURTS OF JURISDICTION? WOULD NOT THE EFFECT OF THE LOCAL STATUTE TO SO DEPRIVE FEDERAL JURISDICTION BE A VIOLATION OF ARTICLE III OF THE FEDERAL CONSTITUTION?

John Louis Nelson was killed in the Bryce Canyon, Utah, air crash disaster on October 24, 1947, while returning home to Chicago from Los Angeles as a passenger aboard Respondent's DC-6 airliner.[1] Petitioner, his executor, brought suit under the Utah death statute[2] against Respondent, a Delaware Corporation (but with its principal office in Chicago), in the District Court for the Northern District of Illinois,[3] for the benefit of the surviving widow and children (R. 3, 4).

The Third Defense pleaded in Respondent's Answer set forth the following proviso to Section 2 of the Illinois Injuries Act[4]:

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1. *Res ipsa loquitur* applies to actions for injuries from such a casualty. Cases collected in *Smith* v. *Penn. Central Airlines*, 76 Fed. Supp. 940.

2. Section 104-3-11 UCA 1943.

3. When suit was filed, *Stephenson* v. *Grand Trunk W. R. Co.*, 110 Fed. (2d) 401 (C. C. A. 7, 1940), held that recovery could be had on foreign actions for wrongful death in Federal Courts in Illinois. Certiorari was granted in that case (310 U. S. 623), but dismissed under Rule 35 (311 U. S. 720). *Davidson* v. *Gardner*, 172 Fed. (2d) 188 (C. C. A. 7, 1949) affirmed the *Stephenson* case. Two later cases, however, reversed the former decisions and held that the proviso to Section 2 of the Illinois Injuries Act deprived the Federal Court of jurisdiction (*Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 Fed. 2d 640, 644; *Munch* v. *United Air Lines*, 184 Fed. 2d 630). At the time of the two latter decisions, the statute of limitations, both of Illinois and of Utah, had run in the instant case.

4. Ill. Rev. Stats. 1949, Ch. 70, pars. 1 and 2. This is a death statute enacted in 1853. Section 1 created a cause of action for wrongful death. Section 2 provided: in whose name the action should be brought; for whose benefit recovery was had; a limit on the amount of recovery; and the time within

"Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

It was alleged that Respondent was licensed to do business and had agents on whom process could be served in Utah where the injury and death occurred; and therefore the District Court in Illinois was barred from entertaining this suit (R. 10). Petitioner moved to strike this defense, raising the constitutional questions presented here. In the alternative, a motion was made to transfer the case to the District Court in Utah under Section 1406 (a) of the Judicial Code (R. 18, 19-22).

The District Court overruled the amended motion to strike the Third Defense, finding:

(a) The proviso to Section 2 of the Injuries Act does not violate Section 13 of Article IV of the Illinois Constitution;

(b) The Illinois statute deprives a Federal District Court in Illinois of jurisdiction to entertain a suit for a wrongful death occurring in Utah;

(c) The deprivation of jurisdiction thus caused by the Illinois statute is not in violation of Article III of the Federal Constitution;

(d) Said statute does not violate the Full Faith and Credit clause of the Federal Constitution.

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which suits must be commenced. The following proviso was added to Section 2 in 1903 (Ill. Laws 1903, p. 217): "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State." This proviso was amended to its present form, quoted in the text, in 1935 (Ill. Laws 1935, p. 916). Of course, the proviso, as it was phrased from 1903 until 1935, was void under the authority of *Hughes* v. *Fetter* (June 4, 1951), 95 L. ed. 822.

The alternative motion to transfer the suit to Utah was likewise denied, the Court finding that venue was properly laid, and since it was, Section 1406 (a) conferred no power to transfer the case; but, in any event, since there was no jurisdiction to entertain the suit, there was nothing before the Court to transfer.

Judgment was thereupon entered for the defendant (R. 22-24).

Petition was made to this Court, but denied, that certiorari issue before judgment in the Court of Appeals (Docket 558, Oct. Term, 1950; R. 43).

Prior to argument and decision of the Court of Appeals, opinion was rendered by this Court in *Hughes* v. *Fetter*, 341 U. S. ....., 95 L. ed. 822 (June 4, 1951).

In spite of that opinion, the Court of Appeals, on July 5, 1951, by a *per curiam* decision held that *Hughes* v. *Fetter* was not decisive of the question here; that the Illinois Statute was properly justified under the Full Faith and Credit clause because it reduced the case load of Illinois courts, and thereby tended to promote the prompt and orderly administration of justice, a matter of vital and legitimate concern to Illinois; that the former holdings of the Court of Appeals for the Seventh Circuit had established that the Illinois statute was a bar to Federal jurisdiction to hear like actions in Illinois; that the Illinois statute was not violative of the single subject provision of Section 13 of Article IV of the Illinois Constitution; and that since the District Court had no jurisdiction of the subject matter of this suit, it had no power to transfer the case under Section 1406 (a) of the Judicial Code.

It is this decision of which review is requested here.

## Basis on Which It Is Contended That This Court Has Jurisdiction.

This Court's jurisdiction is invoked under 28 U. S. C. A., Sec. 1254.

## The Opinion Below.

At the time of the preparation of this Petition and Brief in Support, the opinion of the Court of Appeals below had not been published. It was handed down July 5, 1951. Said opinion is printed in full in the Record (R. 45-50), and, for convenience, made an Appendix to this Petition and Brief. No petition for rehearing was filed.

## The Questions Presented.

### Full Faith and Credit.

Does the fact that Illinois has created and permits recourse to its courts upon actions for wrongful death arising within its boundaries, negate any permissible Illinois policy, within the narrow limits imposed by the Full Faith and Credit Clause, to justify denial of jurisdiction to like actions created by laws of sister States?

Is not the decision of this Court in *Hughes v. Fetter*, 341 U. S. ....., 95 L. ed. 822, decisive of the question that Illinois' policy against foreign actions for wrongful death must yield to the strong unifying force of the Full Faith and Credit Clause?

### Jurisdiction of the District Court.

If a local statute barring jurisdiction of local courts to hear actions for wrongful death arising by laws of sister States is prompted, not by antagonism against wrongful

death suits in general, but rather to reduce the case load of local courts, can such statute have the effect to bar jurisdiction of Federal Courts, sitting locally? Would not a like limitation on Federal Courts be a matter for Congress, and not a State, to determine?

Would not a construction of *Erie* v. *Tompkins* which divests jurisdiction of a Federal Court by reason of such a local statute be in violation of Article III of the Federal Constitution?

Is the denial of jurisdiction to local courts imposed by a local law barring jurisdiction a matter of remedy and of practice and procedure, to which the doctrine of *Erie* v. *Tompkins* has no application, or does the statute express a local policy which if paramount to the Full Faith and Credit. Clause of the Federal Constitution, forms a substantive bar to the forbidden action, to which the doctrine of *Erie* v. *Tompkins* is applicable?

In applying the jurisdictional bar of a local statute to a foreign cause of action under the principle of *Erie* v. *Tompkins* in a diversity case, does a Federal Court adopt local policy as a substantive bar or defense to the cause of action, or does the local statute divest the Federal Court of jurisdiction—the *power* to hear and determine the action?

**On the Alternative Motion to Transfer.**

If under *Erie* v. *Tompkins* a State statute barring jurisdiction of its courts to certain foreign actions likewise bars jurisdiction of the Federal District Courts within that State, may such Federal Court transfer the case to a Federal Court sitting where the cause of action arose under Section 1406 (a) of the Judicial Code?

## Reasons Relied Upon for the Allowance of the Writ.

### Full Faith and Credit.

The Court of Appeals below has decided the Full Faith and Credit question raised here in direct conflict to this Court's decision in *Hughes* v. *Fetter*, 341 U. S. ....., 95 L. ed. 822, June 4, 1951.

### Jurisdiction of the District Court.

The Court of Appeals, in sustaining the validity of the Illinois Statute under the Full Faith and Credit Clause, holds that Illinois has a legitimate interest in regulating and reducing the case load of Illinois' courts, a matter of vital and legitimate concern to that State. The effect of such decision is to say that a State may regulate and prescribe the remedies afforded by a Federal Court, sitting locally. This is contrary to a great body of law decided by this Court that any limitation, impairment, abridgement, destruction or enlargement of Federal jurisdiction on the part of the States is a violation of Article III of the Federal Constitution. The decision below, therefore, is at complete odds with applicable decisions of this Court.

This Court in *Angel* v. *Bullington*, 330 U. S. 183, and *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, has held that local statutes barring jurisdiction of local Courts are effective as a bar to actions in diversity cases in Federal Courts sitting locally. The Court below has held that the Illinois statute barring jurisdiction likewise bars jurisdiction of a Federal Court sitting in Illinois—divests the power to hear and determine the controversy. The question arises as to whether, under the doctrine of *Erie* v. *Tompkins* the local statute, which bars jurisdiction of local courts, may likewise divest jurisdiction of the Federal

Court, or whether, rather, the local statute is expressive of a policy antagonistic or abhorrent to a cause of action created elsewhere, and thus provides a defense to the foreign action, but not a divestiture of jurisdiction. Thus there is raised here an important question of Federal Law which has not been, but should be, settled by this Court.

The jurisdictional question here was decided by the Seventh Circuit in accordance with Petitioner's contention in *Stephenson* v. *Grand Trunk W. R. Co.*, 110 F. 2d 401 (1940). Certiorari was granted in that case (310 U. S. 623), but dismissed under Rule 35 (311 U. S. 720). A like decision was reached by the same Court in *Davidson* v. *Gardner*, 172 F. 2d 188 (1949). The decision below in the case at bar, as well as those of the same Court in *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 630, and *Munch* v. *United Air Lines*, 184 F. 2d 630, overrules the earlier decisions. The fact that certiorari was granted by this Court on the same question, and that the Seventh Circuit has rendered several conflicting opinions upon it, indicate that here is involved an important question of Federal Law which has not been, but should be, decided by this Court.

**On the Alternative Motion to Transfer Under Section 1406 (a).**

If a local statute may deprive a Federal Court of jurisdiction, or provide a defense that does not exist elsewhere, then it is possible that great injustice may be done (as here), unless there is some means of transferring the cause to a Federal Court where there is no local statute having such effect. It was contended below, and decided to the contrary by the Court of Appeals, that Section 1406 (a) does supply the machinery for such a transfer. This presents an important question of Federal Law which has not been, but should be, settled by this Court.

## Prayer for Certiorari.

Wherefore Petitioner, for the reasons outlined above, as amplified by the Brief in support of this petition which follows, prays that this Court grant its writ of *certiorari* to review the proceedings below.

FIRST NATIONAL BANK OF CHICAGO,
as executor of the Estate of John
Louis Nelson, deceased,
*Petitioner.*

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JOHN H. BISHOP,
Board of Trade Bldg.,
Chicago, Illinois,
*Attorney for Petitioner.*

ROBERT J. BURDETT,
JOHN M. FALASZ,
*Of Counsel.*

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### Foreword.

The first two points made and argued in this Brief are (1) that the Illinois statute is void as being counter to the Full Faith and Credit Clause, § 1 of Article IV of the Constitution, and (2) that to permit the Illinois statute to have the effect of barring Federal jurisdiction is a violation of Article III of the Constitution.

In one respect, these two points are intermeshed inextricably,—namely, that it follows as matter of absolute logic, with no possible middle or third ground, that the Illinois statute is *either* void as counter to the Full Faith and Credit Clause *or* it cannot have the effect of barring jurisdiction of the Federal Court below, because to do so would be a clear violation of Article III.

The decision below was rendered after the decision of this Court in *Hughes* v. *Fetter*, 341 U. S. ....., 95 L. ed. 822 (June 4, 1951), and attempts to distinguish that decision on the ground, that, while the Wisconsin bar to foreign death actions is absolute, the Illinois bar is only against those where process can be served where the action arose. It is manifest that Illinois has no antagonism against wrongful death actions, as shown not only by its own creation and recognition of such actions arising locally, but also by its recognition of foreign death actions where process cannot be served where they arise. This inescapably confines the justification for such bar to local jurisdiction to an attempt to regulate and reduce the case load on Illinois courts, as the Court of Appeals held below. *If* this is a proper justification for such a statute under the Full Faith and Credit Clause, *then the local*

*statute cannot bar Federal jurisdiction* because such effect would permit State action to limit, abridge or destroy Federal jurisdiction in violation of Article III. Reduction of the case load of Federal courts is a matter for Congress, and not the States, to determine.

So, we say, one or the other of the first two points made and argued *post* must of necessity be determinative here. We by no means intend by what we have said above to waive the other points raised by this brief.

## I.

### The Proviso to Section 2 of the Illinois Injuries Act Is Counter to the Full Faith and Credit Clause, Section 1, Article IV of the Constitution of the United States.

The Utah statute[1] here sued upon is set forth *verbatim* in an Appendix. It is modeled after Lord Campbell's Act.[2]

The Illinois wrongful death statute was enacted in 1853. It, too, is modeled after Lord Campbell's Act. Section 1 created a cause of action for wrongful death. Section 2 provided: in whose name the action should be brought; for whose benefit recovery was had; a limit on the amount of recovery; and the time in which suits must be commenced (Ill. Ann. Stats., Ch. 70, pars. 1 and 2, and historical note). The following proviso was added to section 2 in 1903 (Ill. Laws 1903, p. 217): "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State."

Prior to the 1903 proviso, Illinois' courts entertained actions for wrongful death created by foreign statutes. *C. & E. I. R. R. Co.* v. *Rouse*, 178 Ill. 132, 139. Following

1. Section 104-3-11 U. C. A. 1943.
2. 9 and 10 Vict. ch. 93.

enactment of the 1903 proviso, Illinois courts held that they were divested of jurisdiction to hear and determine actions for wrongful death created by statutes of sister States (*Dougherty* v. *American McKenna Co.*, 255 Ill. 369, 372; *Walton* v. *Pryor*, 276 Ill. 563, 569[3]; *Wall* v. *Chesapeake & Ohio Ry. Co.*, 290 Ill. 227, 233), and that the 1903 proviso did not violate the Full Faith and Credit Clause. *Dougherty* v. *American McKenna Co.*, 255 Ill. 369, 371, 372.[4]

It is now perfectly clear that the 1903 proviso did violate the Full Faith and Credit Clause of the Federal Constitution. *Hughes* v. *Fetter*, 341 U. S. ....., 95 L. ed. 822 (June 4, 1951).

In 1935 the proviso to section 2 of the Illinois Injuries Act was amended to read as follows:

> "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place." (Ill. Laws 1935, p. 916.)

The Court of Appeals below has held that the 1935 proviso, quoted above, does not violate the Full Faith and Credit Clause, because the bar of the Wisconsin statute in *Hughes* v. *Fetter* was an *absolute bar*, whereas the bar of the Illinois proviso is only *qualified, i. e.*, to cases where process may be served in the State where the injury and death occurred.[5]

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3. Compare *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 233. It would appear that the Illinois statute is void as denying access to Federal Employee's Liability death cases.

4. This case, as did the Wisconsin court in *Hughes* v. *Fetter*, relied on *Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142. Such reliance was misplaced. *Hughes* v. *Fetter*, 341 U. S. ....., n. 6.

5. According to the literal wording of the proviso, it would appear that the bar to maintenance of a foreign death action is

Thus, there is posed the narrow question as to whether Illinois can bar access to its courts on actions for wrongful death created by laws of sister States where process may be served there, when (1) Illinois has created and permits access to her courts on like actions arising in Illinois, and (2) when access to foreign wrongful death actions is permitted in Illinois where service of process on the defendant cannot be had where the cause of action arose. *Hughes* v. *Fetter*, 341 U. S. ....., has effectively disposed of the question where the bar to foreign actions is absolute and where like actions are created and permitted access to courts locally.

Does the fact that the foreign death action can be entertained and reduced to judgment elsewhere justify the Illinois bar, in the light of the Full Faith and Credit Clause, which altered the status of the several States as independent foreign sovereignties each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, and required maximum enforcement in each State of the obligations or rights created or recognized by the statutes of sister States?

It has been held many times that a State cannot escape its Constitutional obligation to enforce the rights and duties validly created under the laws of other States by the simple device of removing jurisdiction from courts otherwise competent. *Hughes* v. *Fetter*, 341 U. S. ....., n.

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interposed where (1) a cause of action for such death exists under the laws of the foreign State, and (2) where service of process may be had upon the defendant in such foreign State; and that if no action was created by the laws of the State where the death was caused, an action would lie in Illinois. Since an action for wrongful death does not lie at common law, and the Illinois wrongful death statute cannot have extra-territorial effect, an action could not be brought in Illinois absent existence of such an action where the injury occurred. The bar is interposed where process may be served upon the defendant where the injury and death occurred, assuming such an action exists there.

6; *Broderick* v. *Rosner*, 294 U. S. 629, 642-643; *Converse* v. *Hamilton*, 224 U. S. 243, 260, 261; *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *Angel* v. *Bullington*, 330 U. S. 183, 188. Likewise, it often has been held that the power of a State to determine limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is subject to the restrictions imposed by the Federal Constitution. *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 233; *Broderick* v. *Rosner*, 294 U. S. 629, 642; *Angel* v. *Bullington*, 330 U. S. 183, 188. The area in which a State may cut down rights otherwise guaranteed by the Full Faith and Credit Clause is narrow and confined. *Broderick* v. *Rosner*, 294 U. S. 629, 642, 643; *Angel* v. *Bullington*, 330 U. S. 183, 188.

The *raison d'etre* for the narrow and confined area in which a State may bar the doors of its courts to foreign actions was succinctly stated in *Pink* v. *A.A.A. Highway Express*, 314 U. S. 201, 210:

> "But the very nature of the Federal Union of States, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one State wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others."

To like effect are *Hughes* v. *Fetter*, 341 U. S. ____, n. 7; *Alaska Packers Ass'n.* v. *Industrial Comm'n.*, 294 U. S. 532, 547; *Pacific Ins. Co.* v. *Commission*, 306 U. S. 493, 502.

From these cases it is clear that it is only in the regulation of peculiarly domestic affairs of a State that the policy expressed in such regulation can bar enforcement of actions created elsewhere. If the foreign action is so at odds with the local policy so expressed that recognition of the foreign action would infringe or impair the regula-

tion of domestic affairs, then the Full Faith and Credit Clause does not compel local recognition of the foreign action.

In each instance it is for this Court to decide between the national policy and the local one. *Hughes* v. *Fetter*, 341 U. S. ____, n. 7; *Pink* v. *A.A.A. Highway Express*, 314 U. S. 201, 210; *Alaska Packers Ass'n.* v. *Commission*, 294 U. S. 532, 547.

We submit that this Court must look behind the statute creating the local bar, and determine the motive or justification for it. This Court so indicated when in *Hughes* v. *Fetter* it held that Wisconsin "has no real feeling of antagonism against wrongful death suits in general", but to the contrary provides a regular forum for cases of that nature arising locally.

It is implicit in the Full Faith and Credit Clause that each State will make available a forum for foreign actions, recognition of which is compelled, at least if such a forum exists for like actions arising locally. (We take it that any State may set up a judicial system which it deems best suited to serve its own needs; and if such system does not provide a forum for an unusual foreign action, it would not be compelled to furnish one.) Illinois does provide such a forum (Sec. 12, Article VI, Constitution of 1870).

What, then, is the justification or motive for the Illinois bar to foreign death actions where service of process on the defendant may be had where the action arose? Illinois has no feeling of antagonism against wrongful death actions, as is evidenced by the fact that she has created such actions locally, and permits access to her courts for enforcement of them. The 1935 proviso likewise permits access locally to foreign death actions where service of process cannot be had where the action arose. In short, Illinois says if it is possible to sue somewhere else, that

must be done; otherwise Illinois will permit suit to be instituted here. So we search in vain for a motive or justification for the bar to *certain* foreign death actions which would infringe or impair local sovereignty; the only possible answer is that Illinois does not want her courts burdened with foreign death actions if they can be entertained where they arose, regardless of the residence of the deceased, or of his personal representative. This is the justification found by the Court of Appeals below where it said that the statute tended to regulate and reduce the case load of the Illinois courts.

Is such justification legitimate in the light of the Full Faith and Credit Clause? We submit that it is not. The basis for the bar is not because of antagonism to wrongful death actions, not because the cause of action is abhorrent to Illinois' morals, or conflicting in any way with her governmental interests, but a simple denial of jurisdiction of her courts to actions created elsewhere, so as to relieve the burden on those courts. If Illinois can bar her courts to foreign actions for wrongful death, simply because she does not want her courts burdened by actions arising elsewhere, why then, cannot she bar actions on judgments entered elsewhere, on notes executed in other States, on insurance policies executed in other States, or on any of the myriad of commercial or tort actions that are daily encountered in our local courts? Since Illinois has not excluded these latter types of actions, the denial of access to her courts to foreign actions for wrongful death would be a clear violation of the privileges and immunities and equal protection clauses of the Fourteenth Amendment.

The Court of Appeals indicates that the Illinois statute is "based on considerations not unlike those responsible for the application of the doctrine of *forum non conveniens*. That doctrine can have no application here, as pointed out in *Hughes* v. *Fetter*, 341 U. S. ..... The decedent was a

resident of Illinois, the executor of his estate is a resident of Illinois and was appointed by an Illinois Court, and while respondent is a Delaware Corporation, it has its principal place of business in Chicago. That doctrine applies to non-resident plaintiffs. *Missouri* v. *Mayfield*, 340 U. S. ....., 95 L. ed. 6 (Nov. 6, 1950).

We submit that the proviso to the Illinois statute is violative of the Full Faith and Credit Clause of the Federal Constitution; and that a State cannot escape the obligation to provide a forum for actions arising under foreign public acts, when it makes available as Illinois does (Sec. 12, Article VI, Constitution of 1870), a forum to try like cases arising locally.

But, *if* Illinois may properly bar access to its courts to foreign actions for wrongful death, because it does not want its courts burdened, then we submit that it is for Congress to legislate to relieve any like burden of litigation in the Federal Courts.

## II.

### The Proviso to Section 2 of the Illinois Injuries Act Cannot Deprive the Federal Court of Jurisdiction Under the Principle of Erie v. Tompkins.

#### A. Such Construction Would Violate Article III of the Constitution of the United States.

1. The Court of Appeals below held that the Illinois statute divested the Federal Court of jurisdiction to hear and determine the Utah action for wrongful death. "* * * the provisions of the Illinois statute were binding on the Federal courts in Illinois, and constituted a bar to the maintenance of an action for damages for wrongful death * * *" (Opinion below, R. 46). "Unfortunately here the District Court had no jurisdiction of the subject matter, hence it

had no power to transfer the case to another court" (Opinion below, R. 50). The holding below was not that the Illinois statute provided a *defense in bar* to the action, as in the illustration in II B, *post*, but that *power to entertain* the action was taken from the District Court by reason of the Illinois statute.

The uniform and unbroken holdings of this Court since adoption of the Federal Constitution have been to the effect that no State action can in any way limit, abridge or destroy Federal jurisdiction conferred by Congress under the grant of power contained in Article III.

The rule was thus stated in *Harrison* v. *St. Louis, etc., Ry. Co.*, 232 U. S. 318, 328, Chief Justice White speaking for the Court:

> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. This doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application."

Other cases[6] so holding, beginning with the decision of

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6. From these many cases expressing this principle we have not cited the following, which, while stating the rule, would now be governed by the doctrine of *Erie* v. *Tompkins*. *Wilson* v. *Tarpley*, 59 U. S. 517; *Kearey* v. *Farmers & M. Bk.*, 41 U. S. 88, 16 Pet.; *Suydam* v. *Broadnax*, 39 U. S. 55, 14 Pet. 67; *Beers* v. *Houghton*, 34 U. S. 215, 9 Pet. 329; *Ex Parte Schollenberger*, 96

Mr. Justice Marshall in *U. S.* v. *Peters*, 9 U. S. 115, 136, follow:

*U. S.* v. *Peters*, 9 U. S. 115, 136; 5 Cranch 65, 77 (Marshall, J.); *The Orleans*, 36 U. S. 138, 144; 11 Pet. 175, 184; *Gordon* v. *Longest*, 41 U. S. 63, 67, 68; 16 Pet. 97, 103, 104; *Union Bk.* v. *Jolly's Admrs.*, 59 U. S. 503, 507 (18 How.); *Hyde* v. *Stone*, 61 U. S. 170, 175 (20 How.); *Cowles* v. *Mercer County*, 74 U. S. 118 (7 Wall.); *Payne* v. *Hook*, 74 U. S. 425, 430 (7 Wall.); *The Belfast*, 74 U. S. 624; *Railway Co.* v. *Whitton*, 80 U. S. 270, 285-287 (13 Wall.); *Insurance Co.* v. *Dunn*, 86 U. S. 214, 223, 224, 226; *Insurance Co.* v. *Morse*, 87 U. S. 445, 453, 454, 458 (20 Wall.); *Hess* v. *Reynolds*, 113 U. S. 73, 77; *Barron* v. *Burnside*, 121 U. S. 186, 198, 200; *Lincoln County* v. *Luming*, 133 U. S. 529, 531; *Southern Pac. Co.* v. *Denton*, 146 U. S. 202, 207; *Chicot County* v. *Sherwood*, 148 U. S. 529, 533, 534; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 112; *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 204, 205; *Western Union* v. *Kansas*, 216 U. S. 1, 35, 36; *Herndon* v. *Chicago Rock Island & Pacific Ry. Co.*, 218 U. S. 135, 158; *Harrison* v. *St. Louis*, 232 U. S. 318, 328; *Wisconsin* v. *Philadelphia & Reading Coal Co.*, 241 U. S. 329, 333; *Terral* v. *Burke Const. Co.*, 257 U. S. 529, 532; *Mason* v. *United States*, 260 U. S. 545, 557; *Pusey & Jones* v. *Hanssen*, 261 U. S. 491, 497, 498; *Matthews* v. *Rogers*, 284 U. S. 521, 529; *Stratton* v. *St. L S W Ry. Co.*, 284 U. S. 530, 533; *Penn. Co.* v. *Pennsylvania*, 294 U. S. 189, 197; *Kelleam* v. *Md. Cas. Co.*, 312 U. S. 377, 381, 382; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 317, note 3, and see 130 Fed. 2nd 10, 17, approved 319 U. S. 317; *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 103-106; *Holmberg* v. *Armbrecht*, 327 U. S. 392, 394.

The basis for the rule is fundamental.

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U. S. 369, 377; *Smith* v. *Railroad Co.*, 99 U. S. 398, 401; *Ex Parte McNiel*, 80 U. S. 236, 243; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405, 410; *Herron* v. *Southern Pacific*, 283 U. S. 91.

Section 1 of Article III provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."

Section 2 of Article III provides, in part:

> "The Judicial power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made under their authority; * * *. Controversies * * * between citizens of different States * * *."

Pursuant to the authority conferred by Article III, Congress has created District Courts, and conferred upon them judicial power as follows:

> "(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs and is between:
>
> 1. Citizens of different States.
>
> * * *" (28 U.S.C.A. Sec. 1332).

This Court speaking through Justice Story in *Martin* v. *Hunter*, 14 U. S. 141, 154, 155, held that in those cases enumerated in Section 2 where the phrase "all cases" was used (such as those arising under the Constitution, Federal Laws, treaties, and admiralty), Federal jurisdiction was exclusive; but in respect to the other class where the word "all" was omitted, such as diversity cases, Congress might qualify the jurisdiction of Federal Courts as public policy dictated. It was there declared (p. 156):

> "But, even admitting that the language of the Constitution is not mandatory, and that Congress may constitutionally omit to vest the jurisdictional power in Courts of the United States, it cannot be denied, that when it is vested, it may be exercised to the utmost constitutional extent."

Thus, there can be no doubt that Congress was granted

the right to create District courts, and to confer on them judicial power to hear and determine "Controversies • • • between citizens of different States." Congress, having exercised its right to create District courts, and having conferred on them power to hear civil actions between citizens of different States, such power may be exercised to the utmost constitutional extent.

Obviously, to permit a State to limit or impair such power, would be a clear violation of Article III.

The Court of Appeals below, relying upon its two earlier decisions in *Trust Company of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640[7], and *Munch* v. *United Air Lines*, 184 F. 2d 630, has held (R. 46) that the proviso to Section 2 of the Illinois Injuries Act constitutes "a bar to the maintenance of an action (in the Federal Court) for damages for wrongful death in an action where, as here, a right of action for such death exists under the laws of the state where the death occurred." (See also R. 50.)

The two cases cited and relied upon have construed *Erie* v. *Tompkins*, 304 U. S. 64, so as to cause the Illinois statute to divest the Federal Court of jurisdiction. By such holdings they permit State action to destroy and render inefficacious judicial power of the United States as granted by the Constitution and provided for by Congress pursuant to its constitutional authority.

The decision below is clearly a violation of Article III of the Constitution of the United States in permitting State action to impair and destroy Federal jurisdiction.

Our contention here goes to the holding below that jurisdiction of the Federal Court is divested because of the Illinois statute (R. 46, 50). If the basis of decision below

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7. This case reversed two earlier cases, thought to express the law when this suit was filed and while it was pending, *Stephenson* v. *Grand Trunk W. R. Co.*, 110 F. 2d 401 (C. C. A. 7, 1940) and *Davidson* v. *Gardner*, 172 F. 2d 188 (C. C. A. 7, 1949).

had been that the Illinois statute expressed a policy making death actions noxious to Illinois' interest, that may well have provided a *defense* to the action in the District Court (see Point IIB, *post*), but it could not impair jurisdiction without violating Article III.

2. Another fundamental reason why *Erie* v. *Tompkins*, 304 U. S. 64, cannot permit the statute in question to divest the jurisdiction of the Federal District Court has been partially touched upon. As stated, Section 2 of Article III provides:

> "The judicial power shall extend to all cases in Law and Equity, *arising under this Constitution, the Laws of the United States*, and treaties made * * *." (Italics ours.)

Jurisdiction of a Federal Court in diversity cases springs from the judicial power of the United States as granted by Article III and as conferred by Congress pursuant to its constitutional authority.

Therefore if the question of jurisdiction of a Federal Court arises, as here, it would seem that the determination of that question would involve Article III of the Constitution, and "Laws of the United States" conferring jurisdiction on Federal Courts in diversity cases; and that this would be a Federal question within the first clause of Section 2 of Article III wherein Federal judicial power extends to *all cases* arising under the Constitution and the laws of the United States; and makes it one whose ultimate disposition may be made only by Federal Courts. This is an area in which *Erie* v. *Tompkins* can have no application. *Urie* v. *Thompson*, 337 U. S. 160, 174; *Holmberg* v. *Armbrecht*, 327 U. S. 392, 394. Every Federal question, "necessarily including that of its own jurisdiction, must be decided in the Federal Court." *Insurance Co.* v. *Morse*, 87 U. S. 445, 454; *Insurance Co.* v. *Dunn*, 86 U. S. 214, 223; *Gordon* v. *Longest*, 16 Pet. 97, 103, 104.

To permit the principle of *Erie* v. *Tompkins* to govern determination of Federal jurisdiction, itself a Federal question arising under the Constitution and Acts of Congress, is violative of Article III of the Constitution of the United States.

**B. Angel v. Bullington, 330 U. S. 183, and Woods v. Interstate Realty Co., 337 U. S. 535, Do Not Justify Any Such Conclusion.**

The holdings in *Trust Company of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2nd 640, 644, and *Munch* v. *United Air Lines*, 184 F. 2nd 630, on which the Court below relied on the question of jurisdiction, were thought by that Court to be compelled by this Court's decisions applying the principle of *Erie* v. *Tompkins* in *Angel* v. *Bullington*, 330 U. S. 183, 191, 192, and *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 537, 538.

1. We have argued above that *Erie* v. *Tompkins*, 304 U. S. 64, can have no application to the determination of Federal jurisdiction, since that is a Federal question.

But even if the principle of that case were pertinent here, its proper application would not justify the conclusion of the Court below.[8]

The Illinois Statute was enacted to "regulate and reduce the case load of the Illinois Courts" (R. 48). In so doing it deals with a matter of remedy,—of practice and procedure, and not of substantive rights to which *Erie* v. *Tompkins* has application.

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8. Unfortunately that Court had already disposed of the jurisdictional point here (R. 46) when it, in deciding the Full Faith and Credit question, held that the Illinois statute was enacted "to regulate and reduce the case load of the Illinois courts" (R. 48). If it had applied that reasoning to the jurisdictional point, it would have been obvious that similar regulation as to Federal Courts is for Congress, and not for a State, to accomplish.

In *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160, this Court, speaking through Mr. Justice Brandeis, held:

> "A state may, on occasion, decline to enforce a foreign cause of action. *In doing so, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere.*" (Italics ours.)

In *Mason* v. *United States*, 260 U. S. 545, 558, it was stated:

> "But these decisions relate to the practice, *the impairing of jurisdiction*, rather than to the determination of the rights of parties after jurisdiction has been acquired." (Italics ours.)

And in *Kelleam* v. *Maryland Casualty Company*, 312 U. S. 377, 382, it was held (and this subsequent to *Erie* v. *Tompkins*):

> "* * * a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute."

In *Fauntleroy* v. *Lum*, 210 U. S. 230, 234, 235, Mr. Justice Holmes spoke for the Court, and said:

> "No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to *jurisdiction* or to *merits*, but the distinction between the two is plain. One goes to the *power*, the other only to the *duty*, of the court. Under the common law it is the *duty* of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has the *power* to do it * * *". (Italics ours.)

The Illinois courts, in construing the instant statute, confirm the viewpoint that denial of jurisdiction to Illinois courts is simply a matter of remedy, and not of substance. In *Walton* v. *Pryor*, 276 Ill. 563, 569, it is held:

> "There is a clear distinction, however, between creating a cause of action and providing for its enforce-

ment, which must be in a court having jurisdiction to hear whether the cause of action has arisen. The legal right comes into existence by the enactment of the law, but the remedy is provided by the establishment of courts and bestowing upon them jurisdiction."

If there is impairment of *power* to hear the controversy, as distinguished from the *duty* as to how it should be decided, the former is a matter for Congress to determine insofar as Federal Courts are concerned, and not the States. The *duty* as to how to decide the controversy comes within the doctrine of *Erie* v. *Tompkins*.

This Court has often held that to remedy and practice and procedure, as distinguished from matters of substance affecting the result of the controversy, *Erie* v. *Tompkins* does not apply. *Cohen* v. *Beneficial Loan Co.*, 337 U. S. 541, 555; *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 533.

2. Having in mind the constitutional foundation[9] on which jurisdiction in diversity cases rests as set forth in Point II A above, the meaning of this Court's decision in *Angel* v. *Bullington* emerges with startling clarity. That decision does not permit a State statute to impinge upon the constitutional jurisdiction of the Federal Court. *What it does is adopt State policy, expressed by the statute, as a defense or substantive bar to a cause of action created elsewhere which is counter to that expressed policy.* Such defense is imposed as a denial of comity, because the foreign action is opposed to local concepts of morality, or in conflict with local governmental interests. A State (and likewise a Federal Court, in applying State policy under *Erie* v. *Tompkins*) is not untrammeled in so denying comity. The Full Faith and Credit Clause "abolished,

9. It was fresh in the minds of this Court, by reason of the related questions clearly explained in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 103-106, and *Holmberg* v. *Armbrecht*, 327 U. S. 392, 394.

in large measure, the general principle of international law by which local policy is permitted to dominate the rules of comity". *Broderick* v. *Rosner*, 294 U. S. 629, 642, 643; *Angel* v. *Bullington*, 330 U. S. 183, 188.

A simple analogy is illustrative. Illinois has a strong public policy against gambling. This is expressed by many criminal statutes against the evil, by creating *qui tam* actions for recovery of gambling losses, and similar enactments. Suppose a gambling debt created in Nevada where such actions are enforceable, and a suit to recover that debt on diversity grounds in a District Court in Illinois. Of course the District Court would not enforce the action. Why? Because it would adopt Illinois' policy against enforcement of such a debt under *Erie* v. *Tompkins*. In doing so Illinois' policy would impose a defense or substantive bar to the action.

Now suppose that Illinois' policy against gambling was *expressed in a statute barring jurisdiction of its courts* to enforce any type of a gambling debt. There is little doubt that such enactment would be within the narrow limits of local policy permitted by the Full Faith and Credit Clause. If under such circumstances the Nevada action were filed in a Federal Court in Illinois, would the Federal Court be deprived of jurisdiction, or would it again adopt Illinois' policy as a defense or substantive bar to the Nevada action? The latter must be the answer. This must be so in view of the constitutional barrier against impairment of Federal jurisdiction by State action. A statute imposing a jurisdictional bar would be nonetheless clearly expressive of Illinois' policy, as much so as a criminal law forbidding gambling, or a statute creating a *qui tam* action. No citation of authority is necessary in support of the assertion that the policy of a State is to be determined by its Constitution, its statutes, or by the decisions of its courts. What is applied, under *Erie* v.

*Tompkins* in such cases, is State policy *no matter how that policy be expressed.*

So in *Angel* v. *Bullington*, the State policy against deficiency judgments was expressed in a statute depriving courts in North Carolina of power to hear or entertain such actions. What this Court determined was that, if such North Carolina policy was permissible under the Full Faith and Credit Clause (and Bullington was foreclosed on this question by the determination of the North Carolina Supreme Court), then a Federal Court in North Carolina was bound under *Erie* v. *Tompkins* to apply North Carolina policy *as a defense or substantive bar* to such a cause of action, but not a jurisdictional bar.

3. What prompted the Court of Appeals to hold that the doctrine of *Erie* v. *Tompkins*, as expounded in *Angel* v. *Bullington* and *Woods* v. *Interstate Realty Co.*, had the effect to cause the Illinois statute to bar constitutionally conferred jurisdiction of the Federal Court?

We respectfully submit that such holding was prompted by two things: first, a failure to appreciate that the doctrine of *Erie* v. *Tompkins* is the very antithesis of constitutionally conferred judicial power under Article III; and, second, because of the use of the phrase "diversity jurisdiction" by this Court in both *Angel* v. *Bullington* and *Woods* v. *Interstate Realty Co.*, cases which involved application of the doctrine of *Erie* v. *Tompkins* where local statutes barred jurisdiction of local courts.

(a) The right of States under *Erie* v. *Tompkins*, to make or expound law, *not involving Federal questions*, is a *reserved* power, not granted by Article III. Article III is a *grant* of judicial power to the Federal government. This grant of judicial power expressly includes the right to confer jurisdiction in diversity cases. It seems fundamental that the *granted* power cannot usurp the *reserved*

power. And it seems equally fundamental that the *reserved* power cannot affect the *granted* power. We submit that nothing in *Erie* v. *Tompkins* or in any of its numerous progeny in the slightest degree attempted to cut down the clear and explicit grant of jurisdiction in diversity cases conferred by Congress in pursuance of Constitutional authority; and that such a construction of *Angel* v. *Bullington* and *Woods* v. *Interstate Realty Co.* is contrary to fundamental concepts.

(b) We respectfully assert the use of the phrase "diversity jurisdiction" in both *Angel* v. *Bullington* and *Woods* v. *Interstate Realty Co.* was unfortunate. *Both had to do with local statutes barring jurisdiction of local courts: Woods,* said, p. 538: "that for purposes of diversity jurisdiction a Federal Court is, in effect, only another court of the State.'" This paraphrased the following expression from *Guaranty Trust Company* v. *York,* 326 U. S. 99, 108: "But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another Court of the State, it cannot afford recovery if the right to recover is made unavailable by the State . . .". It is seen that *Woods* substituted the phrase "for purposes of diversity jurisdiction", for the language, "a Federal Court adjudicating a State-created right solely because of the diversity of citizenship of the parties", used in *York.* The phrase "diversity jurisdiction" was borrowed from *Angel,* pp. 187, 191, 192.

It is plain that the phrase "diversity jurisdiction", as thus used, is employed to differentiate those cases in which a State-created right of action is involved, from cases in which a Federal question is involved.[10] In the one *Erie* v.

10. See *Holmberg* v. *Armbrecht,* 327 U. S. 392, 394. "But in the *York* case we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights. For purposes of diversity suits a federal court is,

*Tompkins* applies. In the other it does not. Yet because of this one unfortunate phrase in both *Woods* and *Angel, cases where State statutes were involved barring jurisdiction,* anyone reading the phrase was prone to reach the conclusion that *Erie* v. *Tompkins* could cause a State statute *to bar constitutionally conferred jurisdiction of the Federal Court,* the conclusion reached below.

Therein, we submit, lie the reasons for the Court of Appeals' decisions overturning the great body of law based on fundamental concepts under Article III, that State action can in no way, directly or indirectly, impair Federal jurisdiction.

## III.

**The District Court Below Had Power Under Section 1406 (a) of Title 28 U. S. C. A. to Transfer This Case to the Federal Court in Utah.**

1. An alternative motion was made in the District Court below to transfer this case to the District Court in Utah under Section 1406 (a), 28 U. S. C. A. (R. 21, 22).

That section provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall * * *, if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

This alternative motion to transfer was denied below, the Court of Appeals finding that since there was no jurisdiction to entertain the suit, there was nothing before the Court to transfer (R. 50).

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in effect, 'only another court of the State'. The considerations that urge adjudication by the same law in all cases within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress."

Section 1406 (a) has been construed to permit transfer of a case brought in the wrong district to the proper district, even after the statute of limitations had run. *Orr v. U. S.*, 174 F. 2d 577 (C. C. A. 2, 1949). That was an admiralty action. Venue was limited to the residence of the libelant or to that in which the ship was located. The action was instituted in a Federal Court where neither of these requisites existed, and the Government raised the question in appropriate fashion.

This decision was followed by another to the same effect in *Untersinger v. U. S.*, 181 Fed. 2nd 953 (C. C. A. 2, 1950).

Both decisions held that the statute was remedial, and should have a liberal construction to prevent injustice.

2. If the District Court in Illinois has no jurisdiction because of the Illinois statute (which of course we do not concede), but other Federal District Courts do have, does Section 1406 (a) vest the Federal Court in Illinois with power to make a transfer to one having jurisdiction?

We submit the answer to this question is supplied by the decision of this Court in *Herb v. Pitcairn*, 325 U. S. 77, 392 Ill. 38. There an action based on the Federal Employers' Liability Act was instituted in a city court. The Illinois Supreme Court held that the city court had no jurisdiction of the cause of action. Illinois law provided machinery for a transfer from the city court to the Circuit Court. After the Statute of Limitations had run under the Federal Act, a motion was made for its transfer. The Illinois Supreme Court held that a suit never had been filed, since it was filed in a court lacking jurisdiction, and that the limitation period provided by Federal law had not been satisfied at the time the case was first docketed in the Circuit Court. This Court held that even though the city court lacked jurisdiction, nevertheless the statute of limitations was satisfied by the filing of the action and the bringing in of the defendant by service of process, where there

was machinery provided for transfer of the cause to a tribunal having jurisdiction to try it.

In this case Section 1406 (a) provides the machinery whereby the cause can be transferred to a court capable of hearing it. Suit was instituted, the defendant was brought in by service of process, and issue was joined. *Herb* v. *Pitcairn* is authority for its transfer to Utah. The statute of limitations provided by Utah is satisfied by the service of process and joinder of issue in the Federal Court in Illinois.

3. If we are wrong on our contention under Full Faith and Credit (which again we do not concede), nevertheless there is no question but that the District Court had power to hear and entertain this suit. If Illinois policy supplies a defense to the suit, this goes to *duty* and not the *power*, as Justice Holmes so clearly pointed out in *Fauntleroy* v. *Lum*, 210 U. S. 230, 234, 235. Under such circumstances, Illinois would be an improper venue, because of the peculiar local policy expressed by the Illinois statute. Under such circumstances, Section 1406 (a) supplies a means to transfer the case to a proper venue.

4. If we are wrong in the contentions raised by Points I and II of this brief, the result will deny to plaintiff substantial damages for the benefit of the bereaved widow and children of decedent. We realize such result does not provide a legal argument in favor of transfer. But undoubtedly thousands of deserving litigants whose actions are now pending before Federal Courts would likewise be denied recourse, if we are wrong on those contentions. And that result certainly furnishes proper motive to search for some machinery or procedure to obviate the injustice.

The construction of Section 1406 (a) as placed on it by the Second Circuit shows that it is a remedial statute to prevent such an injustice. The phraseology of the statute is not technical. Its broad intent is to permit transfer

where the suit was instituted in the wrong place. It supplies machinery whereby this and other like cases can be transferred to a proper venue "in the interest of justice."

## IV.

**The Proviso to Section 2 of the Illinois Injuries Act Contravenes Section 13 of Article IV of the Illinois Constitution of 1870.**

The Illinois Injuries Act was enacted in 1853. It always has had the title, "An Act requiring compensation for causing death by wrongful act, neglect or default." The first section created the right of action for wrongful death; and the second section provided: (a) who was entitled to bring the action; (b) for whose benefit recovery was to be had; (c) a limit on the amount of recovery; and (d) the time within which the action must be brought. (70 Ill. Anno. St., pars. 1 and 2, and historical note.)

The proviso denying jurisdiction to Illinois' courts to entertain causes of action for wrongful death created by laws of other States was first inserted by amendment to Section 2 in 1903 (Laws 1903, p. 217). The proviso then pronounced "that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside this State." This proviso was subsequently amended to its present form, which has been quoted above, in 1935. (Laws 1935, p. 916.)

Both amendatory acts, that of 1903 and that of 1935, bore the title: "An Act to amend Section 2 of 'An Act requiring compensation for causing death by wrongful act, neglect or default'."

Section 13 of Article IV of the Illinois Constitution of 1870 contains the following provision:

> "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title.

> But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; * * *".

The addition of the provisos of 1903 and of 1935 to the Injuries Act brought into that enactment a subject that is not embraced in its title, but which is entirely foreign to its title. An Illinois act *requiring compensation* for wrongful death can have no relation to foreign actions, since the local statute has no extra-territorial effect. An act *requiring compensation* for causing death by wrongful act in Illinois does not embrace a subject which *denies jurisdiction of Illinois courts* to entertain causes of action created by laws of sister States.

The above provision of the Illinois Constitution has been passed upon many times. The most recent decision is *Johnson* v. *Daley*, 403 Ill. 338, 342-344. There the title was: "An Act in relation to a tax on persons engaged in the business of selling cigarettes, and providing for collection of such tax and penalties for violations of the Act." This act was amended to include those who brought cigarettes into the State for consumption as being within its purview. Since this did not constitute a sale, much less a business of selling, the amendment was held void. Likewise, in *Stolze Lumber Co.* v. *Stratton*, 386 Ill. 334, 340-344, the Retailers Occupation Tax Act bore the title: "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption." An amendment was adopted which sought to measure the tax by the sale of property to a contractor, who, in turn, transferred to an owner. On page 341 of the opinion, the Court reviews the authorities and holds that the amendment, by bringing in a new subject—taxing a business of selling for resale or re-transfer—was not within the scope of the title and void under Section 13 of Article IV.

A thorough analysis of the reasons for and application of the single subject clause of Section 13 of Article IV may be found in *Rouse* v. *Thompson*, 228 Ill. 522, at pages 530 through 534. This case, as do those previously cited, clearly demonstrates that the decision of the Court of Appeals below was wrong.

There is a further refinement of the rule under Section 13 of Article IV. That is when a particular section of an Act is amended by an amendatory act with a title such as those of 1903 and 1935, *the amendment may not bring any new subject into the section so amended*, but can only amend the subjects which originally were embraced in that section. For example, an act amending section 2, with a title such as the amendatory acts of 1903 and 1935 bore, could change the person entitled to bring the suit for wrongful death; it could change those entitled to benefit by the recovery; it could change the permitted amount of recovery (which has twice been done); and it could change the limitation period (which has been done once). All of those subjects were originally included in section 2. But the amendatory act cannot bring a complete new subject into section 2, the deprivation of jurisdiction of Illinois' Courts to foreign actions for wrongful death. The law on this refinement of the construction of the single subject requirement is thoroughly expounded in *Dvlese* v. *Pierce*, 124 Ill. 140, 145, 146.

## Conclusion.

For the reasons outlined above in this brief in support of the Petition for Writ of Certiorari herein, we respectfully submit that the Writ should be issued by this Court.

Respectfully submitted,

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# APPENDIX.

THE UTAH WRONGFUL DEATH STATUTE; Section 104-3-11-UCA 1943;

Except as provided in Chapter 1, of Title 42,[1] when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can be maintained for the injury to or death of such person and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section. In every action under this and the next preceding section[2] such damages may be given as under all the circumstances of the case may be just.

1. This Chapter contains the workmen's compensation laws of the State of Utah.

2. Section 104-3-10 UCA 1943 which gives a cause of action to parents of a minor child who has been injured or killed by the wrongful act or neglect of another.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

October Term, 1950, April Session, 1951.

No. 10337.

THE FIRST NATIONAL BANK OF CHICAGO, Executor of the Estate of JOHN LOUIS NELSON, Deceased,
*Plaintiff-Appellant,*
*vs.*
UNITED AIR LINES, INC., a Corporation,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 5, 1951.

Before KERNER, FINNEGAN, and LINDLEY, *Circuit Judges.*

Per Curiam. This is an appeal from a summary judgment dismissing an action brought by plaintiff against defendant to recover damages for the death of plaintiff's testate, because of his wrongful death while a passenger aboard one of defendant's airliners which crashed on October 24, 1947, at Bryce Canyon, Utah. Jurisdiction is based on diversity of citizenship and amount in controversy. Plaintiff's testate prior to his death was a resident and citizen of Illinois. Defendant is a Delaware corporation whose principal office is located at Chicago, Illinois, but it is qualified to do business in the state of Utah and has registered agents available in that state for service of process upon it. The action was brought under the Utah wrongful death statute, Section 104-3-11, U.C.A.1943.

Defendant answered the complaint and moved for summary judgment on the ground that ch. 70, § 2 of the Ill. Rev. St. operated as a bar to the maintenance of the action in Illinois. That section provides: "* * * that no action shall

be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

In answer to defendant's motion, plaintiff contended, inter alia, that the Illinois statute could not limit the jurisdiction of the federal courts, even though service of process could be had upon the defendant in Utah, and argued that to hold that it did would violate the full faith and credit clause of Art. IV, § 1 of the United States Constitution. The trial judge held the Illinois statute deprived the District Court of jurisdiction and that the full faith and credit clause of the Constitution had not been violated.

This court has already held that the provisions of the Illinois statute were binding on the federal courts in Illinois, and constituted a bar to the maintenance of an action for damages for wrongful death in an action where, as here, a right of action for such death exists under the laws of the state where the death occurred. *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640, and *Munch* v. *United Air Lines*, 184 F. 2d 630. But in those cases no contention was made that the Illinois statute violated Art. IV, § 1 of the United States Constitution.

In this court plaintiff renews its contention and cites *Hughes* v. *Fetter*, 341 U. S. ....., decided June 4, 1951, which it says is conclusive on the question presented on this appeal. In that case appellant brought his action in a Wisconsin state court to recover for the death of his intestate in Illinois. He based his complaint on the Illinois wrongful death statute. The trial court held appellant's action was barred in Wisconsin because the Wisconsin statute created a right of action only for a death caused in that state. The Wisconsin Supreme Court affirmed, 257 Wis. 35. The United States Supreme Court, although reaffirming the principle that "full faith and credit does not automatically compel a forum state to subordinate its own statutory policy," recognized that there is a conflict of policies which requires that one be accepted and the other rejected, and held that Wisconsin's expressed statutory policy against permitting Wis-

consin courts to entertain foreign wrongful death actions was in the face of and contrary to the national policy embodied in the full faith and credit clause of the Constitution. The fact that the absolute bar to the action in the Wisconsin courts might result in the total extinguishment of the cause of action because of the practical difficulties of service of process in Illinois apparently influenced the majority to tip the scales in favor of accepting the full faith and credit policy as against the right of Wisconsin to close its courts to causes of action for wrongful death arising out of the state.

In our case no such compelling reason appears. The Illinois statute, as we have already observed, differs substantially from the Wisconsin statute in that it does not, without exception, exclude all foreign wrongful death actions but only those as to which "a right of action * * * exists under the laws of the place where such death occurred and service of process * * * may be had upon the defendant in such place." Thus, it seems clear that whereas the Wisconsin statute constituted an absolute and unconditional refusal on the part of that state to enforce in its courts the wrongful death statutes of sister states, the Illinois act recognizes the existence and enforcibility of the right of action created by such statutes and authorizes the courts of Illinois to entertain such actions, except in cases where they are capable of being prosecuted to judgment in the courts of the state which created them. Whether the Illinois statute and the policy reflected thereby—a policy which appears to be based on considerations not unlike those responsible for the application of the doctrine of *forum non conveniens* in the federal courts—offend against the Constitution's full faith and credit clause is the crucial question presented on this appeal. Its solution can not, it seems to us, be found in the disposition of a case in which the court observed that the statute held unconstitutional could not be regarded as "an application of the *forum non conveniens* doctrine" and went on to point out that the proscribed legislation might result in "a deprivation of all opportunity to enforce valid death claims created by another state,"—a result which can never obtain under the terms of the Illinois statute.

In the light of the Supreme Court's repeated declaration

that "the full faith and credit clause is not an inexorable and unqualified command" and that, consistently with its proper application, "there are limits to the extent to which the laws and policy of one state may be subordinated to those of another," *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, 210-211; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U. S. 532, 546, 547; *Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493, 501; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 498; *Williams* v. *North Carolina*, 317 U. S. 287, 302, the constitutionality of the Illinois act would seem to us to be dependent on the reasonablenss of the conditions it establishes for the maintenance, in the courts of Illinois, of an action arising under the wrongful death statute of a sister state, *i. e.*, on whether the statute is "a permissible limitation on the full faith and credit clause," *Williams* v. *North Carolina*, 317 U. S. 287, 302; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U. S. 532, 546-547, rather than on the fact that a statute which unconditionally excludes all actions based on foreign statutes has been held to violate that clause.

While it is true, as plaintiff argues, that the Illinois statute is not expressive of a policy against wrongful death suits in general, it is clearly an expression of a public policy against permitting Illinois courts to entertain any wrongful death suit which is capable of reduction to judgment in a forum of the state under whose laws it arose. We can not believe that this policy is violative of the constitutional requirement of full faith and credit. On the contrary, it recognizes the validity and enforcibility of the wrongful death statutes of sister states, and provides for their enforcement in the courts of Illinois in the event they can not be enforced in the courts of the state which enacted them. It is hardly to be doubted that the Illinois statute, in tending to regulate and reduce the case load of the Illinois courts, tends to promote the prompt and orderly administration of justice in those courts, which is, undeniably, a matter of vital and legitimate concern to that state. Consequently, since "*Prima facie* every state is entitled to enforce in its own courts its own statutes" and "One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes

the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum," *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U. S. 532, 547-548, it becomes necessary to inquire whether Utah's interest in having its statute enforced in Illinois in a case where it is capable of enforcement in Utah can be said to be superior to Illinois' interest in having its courts free to try cases arising in and under the laws of Illinois without the added burden of trying cases arising in and under the laws of a sister state and triable therein. It seems to us that it can not. Therefore, we hold that the Illinois statute involved in the instant case is permissible legislation under the full faith and credit clause and expressive of a public policy of Illinois not inconsistent with the proper application of that clause.

Plaintiff's next contention is that the 1935 amendment to the Illinois statute under consideration, which added the proviso limiting the wrongful death jurisdiction of the Illinois courts, violates the single-subject requirement of Art. IV of § 13 of the Illinois Constitution. We think this contention is without merit.

In *Michaels* v. *Hill*, 328 Ill. 11, 15-16, it was said: "All doubts or uncertainty arising from the language of the constitution or of the act must be resolved in favor of the validity of the act, and the court will assume to declare it void only in case of a clear conflict with the constitution. It is the duty of the court to so construe acts of the legislature as to uphold their constitutionality if such can reasonably be done. If their construction is doubtful the doubt is to be resolved in favor of the law. * * * To render an act or a portion thereof void as not embraced in the title it must be seen that it is incongruous with or has no proper connection with or relation to the title. If by any fair construction the provisions of such act have a necessary or proper connection with or relation to the title it is not open to this objection. * * * The word 'subject,' as used in the constitution, signifies 'the matter or thing forming the groundwork.' It may contain many parts which grow out of it and are germane to it, and which, if traced back, will lead the mind to it as the generic head. * * * It is not required that

the title of an act be so worded as to form an index to all the provisions contained therein, and mere mentioning in the title of related particulars is not a stating of a plurality of subjects."

Our statute is entitled "An Act requiring compensation for causing death by wrongful act, neglect or default"; certainly the proviso setting forth the circumstances under which an action may be maintained relates to this subject matter.

Finally we pause to consider plaintiff's contention that the court erred in not sustaining its motion to transfer the case to the District Court in Utah pursuant to § 1406(a) of the Judicial Code, 28 U.S.C. § 1406(a). This section applies only when a case has been filed in the wrong venue. *Orr* v. *United States*, 174 F. 2d 577, 580. Compare *Riley* v. *Union Pac. R. Co.*, 177 F. 2d 673, and *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640, 646. Unfortunately here the District Court had no jurisdiction of the subject matter, hence it had no power to transfer the case to another court.

For the reasons stated, the judgment of the District Court must be affirmed. It is so ordered.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

**No. 349**

FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,
*Petitioner,*

*vs.*

UNITED AIR LINES, INC., A CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY BRIEF FOR PETITIONER.

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## Summary of Argument.

I. 1. The rule stated by Respondent that where a foreign action is opposed to local policy, such action will not be enforced, is a general rule in the field of conflicts. It is subject to the Full Faith and Credit Clause of the Constitution. Its applicability to cases where that clause is involved may be classified as follows: (a) those where the local policy must yield to the national policy expressed by that clause; (b) cases where the local policy is paramount to the national policy, because within the State's inherent authority to regulate matters concerning health, safety, morals and welfare; (c) where foreign penal or revenue laws are involved; and (d) where the Federal policy would not compel recognition of the foreign action, but it is entertained, nevertheless, as a matter of comity ..... 1-3

2. Respondent asserts that the instant statute expresses a local policy against only certain foreign death actions; and that such policy is paramount to the national policy. It adopts the reasoning of the Court below that since the Illinois Bar is only qualified, whereas the Wisconsin bar was absolute, the Illinois bar is justified under Section 1 of

Article IV. Such reasoning, while plausible, is unsound, because Illinois' policy against foreign actions for wrongful death is even weaker than that of Wisconsin. Illinois not only has created such actions locally, but also recognizes like foreign actions where process cannot be served where they arose. This indicates a weaker policy, or even no policy at all, on the part of Illinois ..... 3, 4

(a) (i) One asserted justification for the instant statute under Section 1 of Article IV is that it regulates and reduces the local case load. This is squarely counter to the Full Faith and Credit Clause. The principle to be drawn from the cases is that that clause impaired the sovereignty of the several States and made them powerless to cut down the power of courts of general jurisdiction, except where local regulation of health, safety, morals and welfare is involved; and that they cannot cut off jurisdiction for the sole reason that they do not wish their courts burdened with foreign actions. If the fact that process may be served elsewhere is justification for such a local statute under the Full Faith and Credit Clause, then every State could circumvent the Constitution in every case where a multi-State enterprise was defendant ..... 4, 5

(a) (ii) Such a statute actually does not relieve the burden of local courts. Once a judgment is obtained in the foreign State, it must be recognized locally under Section 1 of Article IV. Ordinarily suitors sue where their claims can be collected, and once the judgment is obtained they will sue on the judgment where the assets are located. And so the local courts are burdened irrespective of the statute ..... 5, 6

(b) (i) The instant statute is also sought to be justified under Section 1 of Article IV on considerations similar to those responsible for the doctrine *forum non conveniens* in the Federal Courts. The justifications for the in-

stant statute are almost entirely unlike those bringing that doctrine into play. That is a discretionary doctrine, invoked in each case by weighing eight or more factors. The only one of those factors justifying the instant statute is the foreign origin of the action; and while the doctrine is discretionary and can never be invoked where there is lack of jurisdiction, the instant statute destroys jurisdiction ..... 6-8

(b) (ii) The doctrine of *forum non conveniens* applies to all forms of action. The instant statute applies only to foreign death actions. The discrimination against those possessed of such actions, while all other foreign actions are permitted to be brought in Illinois, would undoubtedly violate the Fourteenth Amendment ..... 8

(b) (iii) The doctrine of *forum non conveniens* can never exist where there is lack of jurisdiction. Respondent bases most of its case on its argument that the local courts are divested of jurisdiction by the instant statute, and therefore the Federal Courts are divested of jurisdiction. Yet it invokes a doctrine which can never exist where jurisdiction is lacking, to destroy jurisdiction ..... 8, 9

II. A. 1. Is not the language quoted by Respondent from *Trust Company of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640, 644, judicial legislation? The basis for the decision in *Erie* v. *Tompkins*, 304 U. S. 64, was that the right to expound law, not involving Federal questions, was reserved to the States and not granted by Article III. Nothing was said in that case about the statute conferring jurisdiction in diversity cases, and in none of its progeny has the Federal statute been cited nor the holding made by this Court that such jurisdiction could be cut off or impaired by State action. If the diversity statute is to be repealed, in whole or in part, is that not for Congress to accomplish, and not the Courts? 9, 10

2. As to *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233, 234, cited by Respondent, it is fundamental that Congress can legislate only within the purview of its granted powers 10

3. As to whether the determination that Federal jurisdiction may not be curtailed by a State statute involves a Federal question, to which *Erie* v. *Tompkins* cannot apply, is fully covered in our Original Brief, pp. 23, 24 10

4. Respondent asserts that under our contention the principle of *Erie* v. *Tompkins* could never result in in the law of the forum closing the Federal courts. Insofar as jurisdiction,—the power to hear and determine the controversy,—is concerned, that is precisely correct. No State action can ever cut off or curtail that power, because it is conferred by Congress under the grant of power in Article III. But local statutes can supply defenses to actions in the Federal courts. There is a well recognized distinction between the two, analogous to organic disability to even consider the controversy, on the one hand, and as to what rule of comity should be applied, on the other. Since under our dual system of Government, State action cannot divest jurisdiction of Federal courts, and, organically, they are possessed of power to determine controversies where jurisdiction has been bestowed on them by Congress, the rules by which they determine those controversies go the merits, and not to jurisdiction .....10, 11

II. B. 1. Respondent, by arguing that considerations not unlike those responsible for the application of the doctrine *forum non conveniens* in the Federal courts provide justification for the instant statute under Section 1 of Article IV, concedes that said statute is procedural, and therefore not binding on the Federal courts under *Erie* v. *Tompkins*. This Court has repeatedly held that doctrine to state a rule of practice and procedure, and the revision of the Judicial Code so treats it....12, 13

2. Another reason for the erroneous decision in the Court below on the jurisdictional point is that said Court failed to appreciate that the doctrine *forum non conveniens*, on which it relied to sustain the instant statute under the Full Faith and Credit Clause, states a rule of practice and procedure, and not one of substantive law which would be binding on the Federal courts under the principle of *Erie* v. *Tompkins*. It is to be noted that the same Court, in a previous case, even where Section 1 of Article IV was not raised, was under the impression that the local statute expressed a rule of *forum non conveniens* ..... 13, 14

III. The argument in our Original Brief on the alternative Motion to transfer under Section 1406 (a) amply meets that of Respondent on said point ..... 14

IV. 1. Respondent argues that where the highest Court of the State has held a statute valid, this Court will be reluctant to pass on a local constitutional question, even though is was not raised in the State decisions. All of the State court decisions cited by Respondent have been nullified by *Hughes* v. *Fetter*, 341 U. S. 609.. 15

2. This Court has the power, where a local constitutional question and Federal questions are presented in a single suit, to determine the local question; and it has made such determination in other cases ..... 15

3. On the merits, *Michaels* v. *Hill*, 328 Ill. 11, the only case relied on by the Court below and by Respondent, sustains the Petitioner's contention, rather than that of Respondent. An Act amendatory of an Act entitled "An Act concerning the levy and extension of taxes" sought to add a debt limitation provision to the original act, which had to do only with the mechanics of levying and extending taxes. Even the title of the Act was amended, adding to the original the debt limitation pro-

vision. It was held that the mechanical process of levying and extending taxes had nothing to do with the power of a municipality to contract indebtedness, that these were two unrelated subjects, and the entire amendatory Act was held void under Section 13 of Article IV of the Illinois Constitution. So here, an Act "requiring compensation", for wrongful death, has nothing to do with divesting jurisdiction of local courts to entertain actions created by laws of sister States.....16, 17

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IN THE

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*Petitioner,*

*vs.*

UNITED AIR LINES, INC., A CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY BRIEF FOR PETITIONER.

### I.

### The Proviso to Section 2 of the Illinois Injuries Act Is Counter to the Full Faith and Credit Clause, Section 1, Article IV of the Constitution of the United States.

1. Respondent first argues (pp. 5-7, Brief for Respondent) that where a foreign action is opposed to local policy, such action will not be enforced. This is a general rule in the field of conflicts. Stated differently, comity will not be granted to a foreign action if it transgresses local policy. The general rule is, of course, subject to the Full Faith

and Credit Clause. Its applicability where that clause is involved may be classified as follows:

(a) Cases where local policy must yield to the national policy embodied in the Full Faith and Credit Clause.[1] Formerly, it was thought that excluded from this area were instances where local courts possessed of general jurisdiction were, by statute, divested of power in certain cases,[2] but this concept has been annihilated by the later decisions.[3]

(b) Cases where local policy is paramount to the national policy[4] embodied in the Full Faith and Credit Clause, because recognition of the foreign action would destroy the State's essential right of sovereignty,[5] *i. e.*, interfere with exercise of its reserved police powers,[6] or "exhibit to the citizens of the state an example pernicious and detestable."[7]

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1. *Hughes* v. *Fetter*, 341 U. S. 609, 612; *Milwaukee Co.* v. *White Co.*, 296 U. S. 268, 279; *Converse* v. *Hamilton*, 224 U. S. 243; *Broderick* v. *Rosner*, 294 U. S. 629, 643, 647.

2. *Anglo-American Prov. Co.* v. *Davis Prov. Co.*, 191 U. S. 373, 374; *Fauntleroy* v. *Lum*, 210 U. S. 230; *Converse* v. *Hamilton*, 224 U. S. 243, 261.

3. *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *Broderick* v. *Rosner*, 294 U. S. 629, 643, 647; *Angel* v. *Bullington*, 330 U. S. 183, 188, 189; *Hughes* v. *Fetter*, 341 U. S. 609, 612.

4. In the workmen's compensation cases, where one employed or domiciled in one state is injured in another, and the contest is as to which of the two actions shall apply, the Court has talked of competing State policies between which the Court must choose under Section 1 of Article IV. *Alaska Packers* v. *Industrial Comm'n*, 294 U. S. 532; *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145. But where a tort action arises by reason of the statute where the wrongful act occurs, and the one wronged asserts the cause of action in another forum, which has a policy opposed to the action, it is more accurate to state that the competing policies are that of the forum and of the national policy expressed in Section 1 of Article IV. *Hughes* v. *Fetter*, 341 U. S. 611, 612.

5. *Pink* v. *A.A.A. Highway Express*, 314 U. S. 201, 209, 210.

6. *Griffin* v. *McCoach*, 313 U. S. 498, 506; *Andrews* v. *Andrews*, 188 U. S. 15, 30-32.

7. *Universal Adj. Corp.* v. *Midland Bank*, 281 Mass. 303, 184 N. E. 152; 87 A. L. R. 1407, 1416.

(c) Cases for the enforcement of a foreign penal law. In these the foreign law is so localized in character that the forum in another State is held to have no power to entertain it.[8] Into either this, or the preceding category, fall cases where the revenue laws of one State are attempted to be enforced in another. Either such laws can have no extra-territorial recognition,[9] or they are denied comity because to adjudicate or construe them might cause the forum embarrassment in its relationship with the sister State. The question is open in this Court as to whether their recognition is compelled under Section 1 of Article IV.[10]

(d) Cases where the Full Faith and Credit Clause would not compel recognition of the foreign action, but where the foreign action is, nevertheless, entertained locally as a matter of comity.[11]

2. Respondent then goes on to assert that the proviso to Section 2 of the Illinois Injuries Act expresses a local policy against only *certain* foreign death actions, *i. e.*, those where process can be served where the action arose,—which local policy, Respondent contends, is paramount to the national policy expressed by the Full Faith and Credit Clause.

It adopts the plausible reasoning of the Court of Appeals below that since the Illinois bar is only qualified, whereas the Wisconsin bar was absolute, Illinois does not permit herself to become an asylum for a defendant who cannot be found where the action arose. Therefore, it is argued, since the Illinois bar does not impose as harsh or rigid a barrier as that imposed by Wisconsin, the

8. *Huntington* v. *Attril*, 146 U. S. 657, 672-675; see also *Milwaukee Co.* v. *White Co.*, 296 U. S. 268, 275.

9. *Moore* v. *Mitchell*, 281 U. S. 18, 24.

10. *Milwaukee County* v. *White Co.*, 296 U. S. 268, 275.

11. *Milwaukee Co.* v. *White Co.*, 296 U. S. 268, 275.

qualified bar is justified under Full Faith and Credit, even though the Wisconsin bar is not.

Plausible as that argument may seem, it will not bear the scrutiny of sound reason. Illinois' policy against foreign actions for wrongful death is even weaker than that of Wisconsin. Not only has Illinois created such actions and permits them access to her courts, but also she recognizes like actions arising under foreign laws if process cannot be served where they arose. This indicates an even weaker policy against foreign wrongful death actions, as such, than does the Wisconsin statute,—or, in fact, no policy at all!

Illinois has not based its bar to the foreign action on the ground that she prefers an action created by herself, designed to protect her own citizens, as in *Alaska Packers v. Industrial Com'n*, 294 U. S. 532[12]; that it violates her reserved police powers, as in *Andrews* v. *Andrews*, 188 U. S. 15, 30-32, and *Griffin* v. *McCoach*, 313 U. S. 498, 506; or that the foreign action exhibits to her citizens "an example pernicious and detestable."

None of these, or like, justifications is available in support of the Illinois bar. The only ones are:

(a) "to regulate and reduce the case load of the Illinois courts" (Brief for Respondent, p. 9; 190 F. 2d 495); and (b), "a policy which appears to be based on considerations not unlike those responsible for the application of the doctrine of *forum non conveniens* in the federal courts . . ." (190 F. 2d 495; Brief for Respondent, pp. 8-10).

(a) (i) We submit the first of these runs squarely counter to the Full Faith and Credit Clause. The purpose of that provision of the Constitution was to alter the status of the several States as independent foreign sovereignties, free to ignore the laws of the others, and to make them integral

12. Compare *Bradford Electric* v. *Clapper*, 286 U. S. 145.

parts of a single Nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the State of its origin. *Milwaukee County* v. *White Co.*, 296 U. S. 268, 277.

That provision "abolished in large measure, the general principle of international law by which local policy is permitted to dominate the rules of comity." *Broderick* v. *Rosner*, 294 U. S. 629, 643. A State "cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent". *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *Broderick* v. *Rosner*, 294 U. S. 629, 643; *Angel* v. *Bullington*, 330 U. S. 183, 188.

Is not the principle to be clearly drawn from these decisions that the sovereignty of each State was curtailed to prevent withdrawal of jurisdiction from courts of general jurisdiction, unless based on other considerations of internal government,—health, safety, morals, welfare,—and that States are powerless to remove or deny such jurisdiction, unless justified by such other considerations? We submit that such principle is clearly indicated, and that a State may not, simply because it does not want its courts burdened, shut off access to actions created by public laws of sister States.

If the fact that process may be served elsewhere is alone justification under the Full Faith and Credit Clause to deny access to courts, then every State could circumvent the Full Faith and Credit Clause in every instance where a carrier, or any other multi-State enterprise, was defendant, not to protect its own health, safety, morals or welfare, but simply to push off onto another State the burden of adjudging the controversy. It was precisely this that Section 1 of Article IV was designed to prevent.

(ii) Finally, another and a clinching answer to the argument that reducing the local case load provides justification

under the Full Faith and Credit Clause *is that once a judgment is obtained, an action on the judgment must be entertained, irrespective of the local statute.*[13] Thus, if respondent's argument were to prevail in many, if not in most, instances the courts of the forum will be burdened, irrespective, since ordinarily suitors sue where their claims can be collected; and if they are compelled to sue elsewhere, but cannot collect there, they will sue on the judgment where the assets are located. And thus two suits are required, the courts of two States burdened, where those of only one should be.

(h) The Court of Appeals below (190 F. 2d 495) and Respondent (Brief for Respondent, pp. 8-10) seek to borrow from the doctrine of *forum non conveniens* in the Federal courts in justification of the statute here.

(i) The considerations for the instant statute are almost entirely unlike those bringing that doctrine into play. *Forum non conveniens* is a discretionary rule, applied by giving weight in each case to many factors, and "it can never apply if there is absence of jurisdiction."[14] The statute here sterilizes jurisdiction if the origin of the action is foreign and process may be served where the action arose.

The factors to be considered in the application of *forum non conveniens* are at least eight in number.[15] The most important of these is the private interest of the plaintiff, and generally, the action must lie where he has chosen to bring it, *especially if in the forum of his residence or citizen-*

13. *Kenney* v. *Supreme Lodge*, 252 U. S. 411; *Milwaukee County* v. *White Co.*, 296 U. S. 268, 275, 276.

14. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508, 504.

15. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508; Annotation, 93 L. ed. 1220, enumerating those factors from *Gulf Oil*. Those not enumerated in the Annotation are: 7. Foreign origin of the action, and, 8. Whether the claim is collectible in the foreign State where it arose.

*ship.*[16] *The only one of these factors considered in the statute here is the foreign origin of the action! The most important one, private interest of the plaintiff, particularly where he is a citizen and resident of the forum, is ignored!* Here Nelson was a citizen and resident of Illinois; his executor is likewise; so, also, are his widow and children for whom recovery is sought!

Access to sources of proof, availability of witnesses and the cost of obtaining their attendance usually have relationship with the proximity of the place of trial to that where the action arose. The instant statute imposes the jurisdictional bar whether the action arises in Hammond, Indiana,[17] adjacent to Illinois' border, Davenport, Iowa, across the Mississippi from Illinois, in Kentucky, across the Ohio from Cairo, Illinois, or whether it arises in San Diego, California, Bangor, Maine, Key West, Florida, or Seattle, Washington. It is apparent that no consideration is given by the statute to the factors having to do with availability of proof.

In the case at bar, everyone aboard the airplane was killed. *Res ipsa loquitur* applies to negligence.[18] If proof of negligence should become an issue, it must be furnished by experts. They are more readily available in Chicago, than in Salt Lake City; and cost of producing them in Chicago would be less. Proof of damages is available only in Chicago. Respondent's principal office is in Chicago, so its ease of producing witnesses there cannot be gainsaid.

Other factors to be weighed in applying the doctrine are

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16. *Koster* v. *Lumbermen's Mutual Cas. Co.*, 330 U. S. 518, 524; *Gregonis* v. *Philadelphia & Reading*, 235 N. Y. 152, 139 N. E. 223, 32 A. L. R. 1, 5; *Universal Adj. Corp.* v. *Midland Bank*, 281 Mass. 303, 184 N. E. 152, 87 A. L. R. 1407, 1414.

17. See *Crane* v. *Chicago & W. I. R. Co.*, 233 Ill. 259, where the injury occurred in Illinois, but the death occurred in Hammond, Indiana.

18. Cases collected in *Smith* v. *Penn Central Airlines*, 76 F. Sup. 940.

absent here and given no consideration by the statute. As to view, if view is necessary, the Civil Aeronautics Authority has plenty of photographs. James Nelson was at the scene within a matter of hours to identify his father's body. He lives in a Chicago suburb. The action created by Utah law is substantially similar to that created by Illinois, so the practical problems, in either forum, are alike. As to enforceability, Illinois is the logical place to bring suit, since it is in Chicago that Respondent has its principal place of business, and, presumably has most of its assets.

(ii) *Forum non conveniens* is a doctrine which applies to all forms of action, although the factors to be considered in its application may well be given different weight in different actions.[19] The statute here singles out only one type of action. If there are considerations similar "to those responsible for the application of the doctrine", which justify the statute under the Full Faith and Credit Clause, then would not the discrimination against those vested with actions for wrongful death, while all other actions are permitted, be violative of the privileges and immunities, the equal protection clauses, and even the due process clause, of the Fourteenth Amendment?[20]

(iii) This Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 504, has said: "Indeed, the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue."[21] Here Respondent bases most of

19. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 504; *Koster* v. *Lumbermen's Mutual Cas. Co.*, 330 U. S. 518, 521, 528; *U. S.* v. *National City Lines*, 337 U. S. 78.

20. See *Gregonis* v. *Philadelphia & Reading, C & I Co.*, 235 N. Y. 152, 139 N. E. 223, 32 A. L. R. 1, 5.

21. We by no means seek to wrench this expression from its context, and attribute to it a meaning broader than its context justifies. What we think it means is that the orbit of the doctrine is narrower than of lack of jurisdiction or mistake of venue. If jurisdiction exists and venue is proper, even so, the doctrine may come into play. If they do not exist, there is no need for application of the doctrine.

its case on its contention that the statute divests jurisdiction of the local courts, and under *Erie* v. *Tompkins*, likewise divests jurisdiction of the Federal Court (Brief for Respondent, pp. 10, 11, 13, 14-16). It now claims the statute is justified under the Full Faith and Credit Clause on considerations "responsible for the application of the doctrine of *forum non conveniens* in the federal courts * * *" (Brief for Respondent, pp. 8, 9). Thus, it invokes a doctrine which is discretionary and which cannot come into play unless jurisdiction exists, to justify the *destruction of jurisdiction!*

## II.

### The Proviso to Section 2 of the Illinois Injuries Act Cannot Deprive the Federal Court of Jurisdiction Under the Principle of Erie v. Tompkins.

### A. Such Construction Would Violate Article III of the Constitution of the United States.

1. Respondent quotes from the opinion of the Court below in *Trust Company of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640, 644, to refute our contention that to permit State action in any way to impair or cut down Federal jurisdiction would be violative of Article III (Brief for Respondent, pp. 10, 11).

Is not the language quoted judicial legislation?

The basis for the majority decision in *Erie* v. *Tompkins*, 304 U. S. 64, was that the right to expound law, not involving Federal questions, was reserved to the States and not granted by Article III. Certainly the statute creating jurisdiction in diversity cases (28 U. S. C. A. 1332) was clearly authorized by Article III. The concurring opinion by Mr. Justice Reed, 304 U. S. 90-92, was grounded on the premise that the "rules of decision" statute, 28 U. S. C. A.

1652, could properly bear the construction that Federal courts were bound to apply not only local statute law, but case law as well. Nothing was said there about the statute creating jurisdiction in diversity cases.

We cannot recall any instance, and certainly Respondent has cited none, where among the numerous progeny of *Erie* v. *Tompkins*, this Court has cited the statute conferring jurisdiction in diversity cases (28 U. S. C. A. 1332) and held that the jurisdiction so conferred could be cut off or impaired by State action.

There have been those, impressed with the injustice of the *Black and White*[22] and other cases which led to the decision in *Erie* v. *Tompkins*, who have advocated the repeal of the statute conferring jurisdiction in diversity cases. If that is to be done, in whole or in part, needless to say it must be accomplished by Congress, and not by the Courts.

2. We do not deem it necessary to reply to Respondent's citation of *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233, 234. Anyone with a cursory knowledge of the law, knows that Congress may not legislate except within the purview of its granted powers.

3. Respondent's answer (p. 11) to our assertion that *the determination* as to whether Federal jurisdiction may be curtailed by a local statute itself presents a Federal question to which the principle of *Erie* v. *Tompkins* cannot apply, is simply that *Erie* v. *Tompkins does* apply, and that the local statute *does* bar jurisdiction of the Federal Court. Thus the issue is firmly joined on this contention. We are content with the exposition in our Brief in Support (pp. 23, 24).

4. Respondent (p. 11) asserts that we argue that the principle of *Erie* v. *Tompkins* could never result "in the law of the forum closing the federal courts" because every

22. 276 U. S. 518.

question would be a Federal question under Article III. *Insofar as the power to hear and determine the controversy is concerned,* this is precisely correct. *No State action can ever cut off or curtail that power,* because it is conferred by Congress under the *grant of power* in Article III. But local statutes *can supply defenses* to actions in the Federal courts. There is a well-recognized distinction between the two, analogous to organic disability to even consider the controversy, on the one hand, and as to what rule of comity should be applied, on the other. The former goes to *power,* the latter to *duty.* Since under our dual system of government, State action cannot divest jurisdiction of Federal courts, and, *organically, they are possessed of power* to determine controversies between citizens of different States, the rules by which they determine those controversies where conflicts of law are involved by borrowing the policy of the State in which they are sitting, are rules imposed by judicial opinion. These go to the *merits,* not to *jurisdiction.*[23]

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23. "The objection that the courts in one State will not entertain a suit to recover taxes due to another or upon a judgment for such taxes *is not rightly addressed to any want of judicial power in courts which are authorized to entertain civil suits at law. It goes not to the jurisdiction, but to the merits,* and raises a question which district courts are competent to decide. * * * *That defense is without merit if full faith and credit must be given the judgment"* (Italics ours). *Milwaukee County* v. *White Co.,* 296 U. S. 268, 275.

"There is a marked distinction between limitations arising from *organic* or *statutory* provisions concerning jurisdiction on one hand, and limitations imposed by judicial opinion under rules of comity on the other. Concerning jurisdiction of the subject matter, it is said: 'Such jurisdiction the court acquires by the acts of its creation, and possesses inherently by its constitution'." 21 C. J. S., Courts, § 35, p. 45.

*"Judicially imposed limitations may better be classed as refusals to exercise jurisdiction rather than denials of its existence.* As said by Judge Cardozo: 'The sovereign in its discretion may refuse its aid to the foreign right. *St. Louis, I. M. & So. R. R. Co.* v. *Taylor,* 210 U. S. 281, 28 S. Ct. 616, 52 L. ed. 1061; *Dougherty* v. *American McKenna Process Co.,* 255 Ill. 369, 99 N. E. 619, L. R. A.

## B. The Progeny of Erie v. Tompkins Do Not Justify Any Such Conclusion.

There is not much point in further arguing with Respondent in its answer (Brief of Respondent, pp. 12-14) to this subdivision of our original Brief in Support of our Petition (pp. 24-30).

Respondent, here, as in II.A.3. above, has squarely joined issue. And we are again content with the exposition in our original Brief, except to point out the following:

1. Respondent, by arguing that "considerations not unlike those responsible for the application of the doctrine of *forum non conveniens* in the federal courts" provide justification for the challenged statute under the Full Faith and Credit Clause (Brief of Respondent, pp. 8-10), has *positively conceded* that the statute here is *procedural,* and, therefore, not binding on the Federal courts under the doctrine of *Erie* v. *Tompkins.*

This Court in *Missouri* v. *Mayfield,* 341 U. S. 1, 5, has indicated that each State may assert its own "*procedural policy*" as to the doctrine *forum non conveniens.* The Court there further said, "If denial of a motion to dismiss an action under the * * * [F.E.L.A.] is rested on such a *general*[24] *local practice,* no federal issue comes into play".

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1915 F. 955, Ann. Cas. 1913 d, 568. From this it has been an easy step to the conclusion that a like freedom of choice has been confided to the courts. *But that, of course, is a false view. Loucks* v. *Standard Oil Co., supra.*'" (Italics ours.) *Bowles* v. *Barde Steel Co.,* 177 Oregon 421, 448, 162 A. L. R. 328, 344, 164 Pac. 2d 692, 703, 704.

See also *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 111, 120 N. E. 198, 202.

24. Illinois has no such "*general* local practice". The instant statute singles out foreign wrongful death actions, and denies recourse to them alone. If it singled out F. E. L. A. actions, and denied recourse as to them, while recognizing all others, the law would be void. *McKnett* v. *St. Louis & S. F. R. Co.,* 292 U. S. 230, 233.

(Italics ours.) With the revision of the Judicial Code, Section 1404(a) (28 U. S. C. A. 1404(a)) set forth the rule and policy of *practice and procedure* as to *forum non conveniens* in the Federal courts. *Ex Parte Collett*, 337 U. S. 55, 71. In that case, against the contention that the revision could have no retroactive effect, it was held, 337 U. S. 71:

> "Petitioner suggests that his action may not be transferred because it was instituted prior to the effective date of the Code. Clearly § 1404(a) is a *remedial provision*, applicable to pending actions. And no one has a vested right in *any given mode of procedure*. . . . *Crane* v. *Hahlo*, 258 U. S. 142, 147." (Italics ours.)

The States may have their own rules and policy as to *forum non conveniens*. They are strictly matters of practice and procedure. The Federal government has expressed its rule and policy on the same subject. *Forum non conveniens* is procedural and the new code so treats it. *United States* v. *National City Lines*, 337 U. S. 78, 80-84; Moore's Commentary on the U. S. Judicial Code, p. 331, n. 87. Being matters of practice and procedure, they are within the grant of judicial power conferred by Article III, and, therefore, unaffected by the doctrine of *Erie* v. *Tompkins*. Obviously, any State rule on this subject can in no way affect the Federal courts.

2. In addition to the reasons we have given in Point II. B. 3. of our Original Brief (pp. 28-30), it is apparent that the Court of Appeals below reached its erroneous conclusion on the jurisdictional question here, because of its failure to appreciate that the doctrine of *forum non conveniens*, on which it relies to sustain the instant statute under the Full Faith and Credit Clause (190 F. 2d 495), states a rule of *practice and procedure*, and not one of *substantive law* which would be binding on the Federal

courts under the principle of *Erie* v. *Tompkins*. And it is to be noted that the Court below felt that the local statute expressed a rule of *forum non conveniens*, even when the Full Faith and Credit question was not even raised. *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d, 640, 646. Brief for Respondent, p. 15.

## III.

### The District Court Below Had Power Under 28 U. S. C. A. 1406 (a) to Transfer This Case to the Federal Court in Utah.

The alternative motion to transfer is important here only if certain other conclusions are reached by the Court.

It is unimportant if: (a) The Illinois statute is held counter to Section 1 of Article IV; (b) the Illinois statute is held to violate Section 13 of Article IV of the Illinois Constitution; (c) the Illinois statute is sustained under the above Constitutional provisions, but it is held (i) that it *cannot* divest Federal Jurisdiction, *and* (ii) *does not* supply a defense on the merits.

It is vital only if the Illinois statute is sustained under the above Constitutional provisions, both Federal and State, *and* (i) has the effect to divest Federal Jurisdiction, *or* (ii) supplies a defense to the Utah action on the merits.

The argument in our Original Brief (pp. 30-33) amply meets that of Respondent (Brief for Respondent, pp. 14-17).

## IV.

**The Proviso to Section 2 of the Illinois Injuries Act Contravenes Section 13 of Article IV of the Illinois Constitution of 1870.**

1. Respondent asserts that this Court should not consider the Illinois constitutional question raised here, because of the decisions of the highest Court of the State upholding the statute (Brief for Respondent, pp. 15, 16). Those decisions have all been nullified by *Hughes* v. *Fetter*, 341 U. S. 609.

2. In *Michigan Central Railroad* v. *Powers*, 201 U. S. 245, 291, cited by Respondent, this Court held:

> "Undoubtedly a Federal Court has the jurisdiction, and when the question is properly presented, it may often become its duty, to pass upon an alleged conflict between a statute and state Constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the State or of the Federal Constitution, may be presented in a single suit, and call for consideration and determination."

In a later case, *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 187, 188, an attack was launched upon a State license tax on the generation of electricity. Federal, as well as State, constitutional questions were raised. This Court undertook to dispose of all of the questions raised in that case, whether State or Federal, and expressly passed upon a State constitutional question similar to that raised by Petitioner here.

3. *Michaels* v. *Hill*, 328 Ill. 11, cited by Respondent on the merits of this question, upholds *Petitioner's* contention, rather than that of *Respondent*. An act amendatory of an act entitled "An Act concerning the levy and extension of taxes" was involved. The amendatory act

bore the title: "An Act to amend the title and Section 2 of an act entitled 'An Act concerning the levy and extension of taxes', approved May 9, 1901, in force July 1, 1901, as amended; and to add a new Section thereto to be known as Section 3."

The original Section 2 was amended, but the changes were made in subjects originally embodied in that section. Section 3 was added to the original act, containing an entirely new subject, namely, providing a limitation of indebtedness in counties having a population of less than 500,000 and in cities, townships, school districts and other municipal corporations having a population of less than 300,000. Lastly, the title of the original act was amended to read as follows: "An Act concerning the levy and extension of taxes, and also providing for a limitation of indebtedness in counties having a population of less than 500,000 and in cities, townships, school districts, and other municipal corporations having a population of less than 300,000."

The Court held that Section 3, which was added by the amendatory act, had to do with the power of municipalities to incur indebtedness, a matter wholly independent of and having nothing to do with, the levy and extension of taxes; that limitation of indebtedness was a matter affecting the municipality, and one with which the County Clerk, in the levy and extension of taxes, had no concern. It was there held (p. 19):

> "It seems beyond the realm of debate that the power of a municipality to incur indebtedness is not within or related to the subject of the duties of the County Clerk in the extension or scaling of taxes. While the two subjects are related to the general subject of revenue, they bear no relation to each other."

The amendatory act was held to be wholly invalid because in conflict with Section 13 of Article IV.

Here, the creation of an action for wrongful death, and a provision that jurisdiction of local courts are denied to foreign actions for wrongful death, may well both be related to the subject of wrongful death. But it is apparent that an act "requiring compensation" for wrongful death is not related to an act which divests the jurisdiction of courts to hear or entertain actions created by the laws of sister States.

## Conclusion.

For the reasons set forth above, and in our Original Brief in Support of the Petition herein, we respectfully request that the decisions below be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

**No. 349**

FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,
*Petitioner,*

*vs.*

UNITED AIR LINES, INC., A CORPORATION,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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### OPINION BELOW.

The opinion of the Court of Appeals, affirming the action of the District Court, is reported at 190 F. 2d 493. Prior to the rendition of that opinion, petitioner sought a writ of certiorari from this Court to review the judgment of the District Court. In that petition, petitioner raised the same three points now advanced as Points I, II and III in this petition. This Court denied the petition (341 U. S. 903; No. 558, October Term, 1950; R. 43). The present Point IV—the claimed violation of the Illinois Constitution—although ruled upon by the District Court was omitted from that petition.

## JURISDICTION.

The statutory basis of jurisdiction of this Court is sufficiently stated in the petition.

## QUESTIONS PRESENTED.

Was not the judgment of the Court of Appeals, affirming the action of the District Court, correct because:

1. May not Illinois, without violating the full faith and credit clause of the Federal Constitution, establish a public policy prohibiting suits in Illinois on foreign death statutes in those cases where the defendant can be served in the foreign state?

2. In a diversity suit, does not the doctrine of *Erie R. Co.* v. *Tompkins*, without violating Article III of the Federal Constitution, require the Federal courts in Illinois to recognize the public policy of Illinois, as expressed in its statute?

3. Was not a transfer to Utah under Section 1406(a) of the Judicial Code correctly denied for two reasons: first, the action was not brought in the wrong venue; and, second, the court did not have jurisdiction of the subject matter in any event?

4. Is not the proviso to Section 2 of the Illinois Injuries Act clearly valid under Section 13 of Article IV of the Illinois Constitution of 1870?

## STATUTE INVOLVED.

The Illinois Injuries Act as it existed at the time of the filing of this suit in 1948 is set forth in the Appendix at the end of this Brief. Since then, Section 2 has been amended in matters not here material (Illinois Revised Statutes, 1949, Chapter 70, Section 2; Laws of Illinois 1949, p. 1029). The part of Section 2 here important (unchanged since its enactment in 1935) provides as follows:

"Provided, further, that no action shall be brought

or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

This Illinois statute differs significantly from the Wisconsin statute declared invalid by this Court in *Hughes v. Fetter*, 341 U. S. 609, in that the Illinois statute does not, as did the Wisconsin statute, prohibit all actions for foreign deaths. The Illinois statute recognizes the foreign death right of action, but bars such an action in Illinois only when it can be prosecuted in the state where the death occurred.

## STATEMENT.

Petitioner's decedent was killed in an airplane crash in Utah in 1947 while a passenger aboard respondent's DC-6 airliner. Petitioner, as executor, brought suit in the District Court in Illinois under the Utah Death Statute (Sec. 104-3-11 Utah Code Ann. 1943) against respondent (R. 3, 4; Petition, p. 2).

As a bar, respondent set up the above quoted portion of Section 2 of the Illinois Injuries Act and the fact that respondent was qualified to do business in Utah and had registered agents there available for service of process (R. 10). Petitioner moved to strike on the ground that this statute could not limit the jurisdiction of the federal courts (R. 11).

Thereafter, petitioner twice amended its motion to strike to raise the constitutional questions here attempted to be presented (the claimed violations of the full faith and credit clause, of Article III and of the single-subject provision of the Illinois Constitution) (R. 13, R. 19). Each

motion to strike was accompanied by an alternative motion to transfer the cause to Utah (R. 12, 15, 21).

The District Court denied both the motion to strike and the motion to transfer and, petitioner declining to plead further, entered judgment for the respondent (R. 22-24).

Petitioner appealed to the Court of Appeals (R. 25), but prior to judgment in that Court petitioned this Court for certiorari. As stated, this Court denied the petition. The Court of Appeals affirmed, correctly interpreting, respondent submits, the decision of this Court in *Hughes* v. *Fetter*, 341 U. S. 609, which had been decided during the pendency of the appeal in the Court of Appeals.

# ARGUMENT.

## SUMMARY.

The judgment of the Court of Appeals was correct. The Illinois statute, unequivocally stating the fixed public policy of the State of Illinois, does not violate the full faith and credit clause—it does not absolutely prohibit all foreign death actions in Illinois, but only those in which suit can be brought in the state of the death. Thus, a plaintiff is always assured of a right of action and a forum for redress. This significant difference makes inapplicable the decision and reasoning of this Court in *Hughes* v. *Fetter*, 341 U. S. 609, invalidating the Wisconsin statute. Further, under the doctrine of *Erie R. Co.* v. *Tompkins* and the subsequent decisions of this Court, the Illinois statute prevents petitioner from suing in the Federal courts in Illinois where the only ground of federal jurisdiction is diversity of citizenship; Article III of the Federal Constitution is not thereby violated. Nor does the Illinois statute violate the single-subject provision of the Illinois Constitution.

Finally, the transfer to Utah was correctly refused.

## I.

### THE PROVISO TO SECTION 2 DOES NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION.

Petitioner argues that the proviso violates the full faith and credit clause.* Its argument now is grounded upon *Hughes* v. *Fetter*, 341 U. S. 609, which invalidated the Wis-

* The same contention was advanced in this Court by petitioner in its original petition for certiorari.

consin Injuries Act.** Respondent believes the Court of Appeals (190 F. 2d 493, 494-496; R. 46-49) correctly held that decision inapplicable. In that case, the Wisconsin statute absolutely prohibited suits in Wisconsin on foreign death actions. The Illinois statute contains no such provision. It recognizes foreign death actions and authorizes such suits to be brought in Illinois, except where there is a right of action in the foreign state and the defendant can be there served. If, however, a defendant cannot be served in the foreign state, but can be served in Illinois, then Illinois refuses to become an asylum for such a defendant and suit can be brought in its state courts. Under the Illinois statute a plaintiff always has a right of action and a forum in which to prosecute it. Such a statute clearly does not violate the full faith and credit clause and is readily distinguished from the statute involved in *Hughes* v. *Fetter*. The opinion of the Court of Appeals correctly so states (190 F. 2d 493, at 494-496; R. 46-49).

The right of Illinois to exclude from its courts certain foreign death actions is based on sound authority:

It is well settled that rights given by a foreign statute will not be enforced in another state where they offend the statutes or public policy of the forum (*Texas & Pacific R. R. Co.* v. *Cox*, 145 U. S. 593, 605; *Stewart* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 448; *Indemnity Insurance Co. of North America* v. *Pan American Airways*, 57 F. Supp. 980, 981 (D. C., N. Y.); *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198, 200, and cases therein cited; *State, ex rel., Bossung* v. *District Court*, 140 Minn. 494, 168 N. W. 589, 590; Restatement of the Law, Conflict of Laws, Section 612).

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** The original petition was denied on April 9, 1951 (341 U. S. 903), after the *Hughes* case had been argued before this Court (341 U. S. 609).

In *Griffin* v. *McCoach*, 313 U. S. 498, this Court said at page 507:

> "• • • Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment it has recognized that a state is not required to enforce a law obnoxious to its public policy. *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160, 161; *Hartford Indemnity Co.* v. *Delta Co.*, 292 U. S. 143, 150."

Further, the sovereign, in its discretion, may refuse to aid the foreign right (Mr. Justice Cardozo, in *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198, at 202).

The public policy of the State of Illinois is clearly and unambiguously expressed:

> "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

That policy is not a prohibition against *all* foreign death actions, but only against those where there is a right of action in the foreign state and the defendant can be there served. In other words, Illinois has refused not only to become an asylum for those seeking to avoid their just obligations, but it has equally refused to become a magnet drawing to itself wrongful death actions from all over the Union. The fact is that the party injured by the wrongful death always has an action and a forum.

When the proviso was initially added in 1903 (Laws of Illinois 1903, p. 217), it prohibited all foreign death actions as did the Wisconsin statute. In 1935, however, it was changed to its present form set out above (Laws of Illinois 1935, p. 916).

Further, in interpreting the full faith and credit clause, this Court has repeatedly insisted that it will weigh all the interests of each state involved before holding that the full faith and credit clause qualified one state's power to govern its own affairs. In *Alaska Packers Assn.* v. *Industrial Accident Comm.*, 294 U. S. 532, this Court refused to give effect to an Alaska statute in a proceeding in California. The Court said at page 547:

> "* * * the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."

Petitioner, by its quotation from *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201 (Petition, p. 15), concedes that the Constitution cannot be used as a means for compelling one state wholly to subordinate its own laws and public policy concerning its peculiarly domestic affairs to the laws and policies of others.

The public policy of Illinois in this case, as expressed in its statute, clearly outweighs the interest of Utah and the other states of the Union for the following reasons:

The legislature of Illinois undoubtedly had in mind the difficulties and hardships involved in compelling witnesses, who in all probability would reside in the state where the accident occurred, to come to Illinois to testify. Other important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Too, Illinois is vitally interested in preventing the administrative difficulties which arise in its courts when litigation is piled up in congested centers, instead of being handled at the place of origin, and in providing relief from the unjust tax burdens and the burdens of jury duty imposed upon its residents when foreign cases are imported into its courts. Further, Illinois is naturally interested in preserving to its citizens reasonable access to its already overcrowded courts.

Although the Court of Appeals mentioned only one factor—the case load—as justifying the Illinois policy, the other considerations mentioned above are equally important.

Considerations such as these were recognized as important and controlling by this Court in upholding the right of states to deny to non-residents access to their "often over-crowded courts" in actions under the Federal Employers' Liability Act (*Missouri, ex rel., Southern Railway* v. *Mayfield*, 340 U. S. 1, 4; *Douglas* v. *New York, New Haven & Hartford R. R. Co.*, 279 U. S. 377).

Furthermore, a state court "may in appropriate cases apply the doctrine of *forum non conveniens.*" (*Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501, at 504.) Similarly, this Court has sustained Federal statutes granting a defendant the same protections as afforded by that doctrine. (*U. S.* v. *National City Lines*, 334 U. S. 573, at 598.)* With the same justification, a state legislature may by statute, as did Illinois, afford a defendant the same protection. Such state action is reasonable and is a valid motive or justification (Petition, p. 16).

* To the same effect see *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501; *Koster* v. *Lumbermen's Mutual Co.*, 330 U. S. 518; and *Mottoles* v. *Kaufman*, 176 F. 2d 301, 303. In some of the cases "often overcrowded courts" are referred to. Also "administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin."

A statute enacted in the interests of the orderly and speedy administration of justice should not be held to violate the full faith and credit clause so long as it does not deprive a plaintiff of all right of redress. The Illinois statute does not.

The Court of Appeals correctly held that the proviso to Section 2 did not violate the full faith and credit clause.

## II.

## THE PROVISO TO SECTION 2 DOES NOT VIOLATE ARTICLE III OF THE FEDERAL CONSTITUTION.

Plaintiff argues that the application, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, to the federal courts in diversity cases of the proviso in Section 2 violates Article III of the Federal Constitution.*

### Diversity Jurisdiction.

The Court of Appeals, although not referring specifically to Article III, rejected this contention in *Trust Company of Chicago* v. *Pennsylvania Railroad Co.*, 183 F. 2d 640 (cited by the Court in its opinion in this case (190 F. 2d 493, 494; R. 46)). In the *Trust Company* case, the Court said at page 644:

> "Nor do we think this means that the state statute has impaired the federal jurisdiction. Federal diversity jurisdiction, created by the Congressional act, as interpreted by the Supreme Court, is limited in the absence of other grounds for jurisdiction, to cases which the state court might entertain. In other words, implicit in the diversity statute, is the limitation resulting from the Supreme Court's interpretation of diversity jurisdiction. If, as the court says, the federal

* The same argument was made to this Court in petitioner's first petition for certiorari.

court, sitting in diversity cases, is only another court enforcing the remedies cognizable by the state court, the limitation upon diversity jurisdiction is inherent in the act creating Federal jurisdiction solely upon the accident of diversity. No new remedies are created by the statute; it merely lodges in another court the authority to enforce remedies cognizable in the state court. The federal court, by congressional intent, as the Supreme Court rules, is just the same as that of the state court (provided diversity exists), no more and no less. If, as has been suggested, diversity jurisdiction has been limited; that limitation arises not from action of the state but exists inherently in the federal statute itself as authoritatively interpreted."

Further, the argument that Article III is violated is based upon a misconception of the source of the diversity jurisdiction of the federal courts. That jurisdiction is not one granted by the Constitution, but is one derived wholly from the authority of Congress. (*Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233-234.)

Naturally a federal court has power to determine the question of its own jurisdiction. And that was done here by the District Court when it found that Section 2 of the Illinois Injuries Act was applicable under the doctrine of *Erie R. Co.* v. *Tompkins* and closed the federal courts in Illinois to petitioner's claim.

Under petitioner's argument, the doctrine of *Erie R. Co.* v. *Tompkins* (which applies *only* in diversity cases) could never result in the law of the forum closing the federal courts, because every question, according to plaintiff, would be a federal question under Article III. This Court, however, has held the federal courts closed by state statutes. (*Angel* v. *Bullington*, 330 U. S. 183; *Woods* v. *Interstate Realty Co.*, 337 U. S. 535.)

## Erie R. Co. v. Tompkins.

The doctrine of *Erie R. Co.* v. *Tompkins,* and the subsequent decisions of this Court following that case, were correctly applied.

Petitioner concedes (Petition, pp. 27-28) that, under the doctrine of *Erie R. Co.* v. *Tompkins,* that which is applied is state policy no matter how that policy is expressed. It further concedes (Petition, p. 27) that such policy can be expressed by a statute barring jurisdiction of its courts. Here, Illinois has positively, by statute, expressed a state policy, *i. e.,* the refusal to entertain in its courts suits for deaths occurring outside of Illinois so long as there is a right of action in the foreign state and the defendant can be served there.

The Court of Appeals in *Trust Company of Chicago* v. *Pennsylvania Railroad Co.,* 183 F. 2d 640, and *Munch* v. *United Air Lines,* 184 F. 2d 630, held that under the doctrine of *Erie R. Co. v. Tompkins,* 304 U. S. 64, the proviso of Section 2 of the Illinois Act prevented the plaintiffs from suing in the federal courts in Illinois where the only ground of federal jurisdiction was diversity of citizenship.* Respondent believes that the Court of Appeals in this case and in the *Trust Company of Chicago* and *Munch* cases correctly held that the proviso to Section 2 prevents suit

* The *Trust Company of Chicago* (183 F. 2d 640) and *Munch* (184 F. 2d 630) cases overruled two earlier decisions by the Court of Appeals (*Stephenson* v. *Grand Trunk W. R. Co.,* 110 F. 2d 401, and *Davidson* v. *Gardner,* 172 F. 2d 188) (Petition, p. 8). This Court, however, had granted certiorari in the *Stephenson* case limiting its review solely to the question whether the District Court properly disposed of the case in view of Section 2 of the Illinois Injuries Act (310 U. S. 623). Subsequently, the parties settled the case and dismissed it on stipulation (311 U. S. 720). In a note in 44 Illinois Law Review 533, at 536, it is observed in connection with the *Stephenson* and *Davidson* cases (footnote 20) "* * * Had the cases reached the Supreme Court, there seems little doubt but that they would have been reversed."

in Illinois in diversity cases and that no other decision is consistent with *Guaranty Trust Co.* v. *York*, 326 U. S. 99; *Angel* v. *Bullington*, 330 U. S. 183; *Woods* v. *Interstate Realty Co.*, 337 U. S. 535; *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, rehearing denied 338 U. S. 839.

In connection with these cases plaintiff admits (Petition, p. 29) that *Woods* v. *Interstate Realty Co.* and *Angel* v. *Bullington* "both had to do with local statutes barring jurisdiction of local courts." This is exactly the situation here and in both of those cases the bar of the state statutes was upheld as applicable to the federal courts. These decisions clearly show that they do not rest on any question of terminology: supposed differences between substance or procedure or between substantive rights or remedial rights or between a defense or a substantive bar are not the controlling factor. The paramount consideration in diversity cases is that federal litigants should have only such rights as they would have in the state courts in the same state. If the state courts are closed so also are the federal courts. In *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, the Court succinctly expressed the essence of the doctrine of *Erie R. Co.* v. *Tompkins* at page 532:

> "*Erie R. Co.* v. *Tompkins*, 304 U. S. 64, was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied in the federal court. Otherwise, those authorized to invoke the diversity jurisdiction would gain advantages over those confined to state courts."

Reduced to its essence, petitioner's argument is that *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and the cases sub-

sequently decided by this Court are unconstitutional under Article III and should be overruled.

Article III has not been violated. The decision of the District Court, affirmed by the Court of Appeals, is correct.

## III.

### PETITIONER'S MOTION UNDER SECTION 1406(a) OF THE JUDICIAL CODE TO TRANSFER THE CAUSE TO UTAH WAS CORRECTLY DENIED.

The Court of Appeals correctly affirmed the refusal of the District Court to grant petitioner's alternative motion to transfer this case to the District Court of Utah under Section 1406(a) of the Judicial Code (Title 28 U. S. C., Sec. 1406(a)), (R. 23).*

That section provides:

> "(a) The district court of a district in which is filed a case *laying venue in the wrong division or district* shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (Emphasis supplied.)

That section applies only when there is **wrong venue.** (See Reviser's Note quoted below in *Orr v. United States*, 174 F. 2d 577.) If the District Court here had had jurisdiction, the venue was correct under Section 1391(c) of the Judicial Code because defendant was doing business in Illinois (Title 28, United States Code, Section 1391(c)). Venue being proper, Section 1406(a) therefore has no application.

The fact that the District Court was without jurisdiction because of the proviso to Section 2 (see below) does not mean that the venue was improper, for the reason that

* Petitioner's original petition to this Court also attacked the refusal to transfer under Section 1406(a).

there is a vast and essential difference between jurisdiction and venue (*Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167-168; Moore's Commentary on the U. S. Judicial Code, pages 172-173). Lack of jurisdiction of subject matter is fatal and can be raised at any time (*Green* v. *Obergfell*, 121 F. 2d 46, 54-55 (C. A., D. C.), certiorari denied 314 U. S. 637; *Walton* v. *Pryor*, 276 Ill. 563, 565).

*Trust Company of Chicago* v. *Pennsylvania Railroad Company*, 183 F. 2d 640, at 646; held in a similar fact situation that Section 1406(a) was inapplicable.

The cases relied on by petitioner (*Orr* v. *United States*, 174 F. 2d 577 (C. A. 2) and *Untersinger* v. *United States*, 181 F. 2d 953 (C. A. 2)) are not in point, as in both cases the venue was improper.*

As stated, lack of jurisdiction is not improper venue.

In addition, there can be no transfer under Section 1406(a) unless the court initially has jurisdiction.

In *Orr* v. *United States*, 174 F. 2d 577 (C. A. 2), relied on by petitioner, the Court said at page 580:

> "The Reviser's Note to Section 1406(a) says that that section 'provides statutory sanction for transfer instead of dismissal, where venue is improperly laid.' This comment on the scope of Section 1406(a) seems to point directly to the elimination of the bar of the statute of limitations in cases *where jurisdiction exists* and there is nothing to prevent its exercise but the lack of proper venue." (Emphasis supplied.)

The proviso to Section 2 of the Illinois Injuries Act deprives the court of jurisdiction of the subject matter. The Court of Appeals so held in this and in the *Munch* and *Trust Company of Chicago* cases. The Illinois law on this is

* That improper venue was the controlling issue in the *Orr* case is apparent from *LeMee* v. *Streckfus Steamers, Inc.*, 96 F. Supp. 270, 272 (D. C., Mo.).

also clear. (*Dougherty* v. *American McKenna Process Co.*, 255 Ill. 369; *Wall* v. *Chesapeake & Ohio Railroad Co.*, 290 Ill. 227; *Walton* v. *Pryor*, 276 Ill. 563.) Therefore, no transfer can be made under Section 1406(a).

*Herb* v. *Pitcairn*, 325 U. S. 77, is no authority for a transfer in this case. In that case the Court merely held that the statute of limitations of the Federal Employers' Liability Act had been satisfied; it decided nothing as to a transfer even under the Illinois practice. More important, no question was raised, and consequently none was decided, as to federal transfer procedure. As shown above, no transfer can be made under Section 1406(a) unless the court initially has jurisdiction.

Petitioner relies upon the fact that the *Stephenson* (110 F. 2d 401) and *Davidson* (172 F. 2d 188) cases were not overruled until the statute of limitations had run (Petition, p. 2), but the chronology of events shows its reliance was not well founded.

In this case, petitioner's death occurred October 24, 1947 (R. 3). Suit was filed October 5, 1948 (R. 3). The applicable Utah statute of limitations was two years (R. 16), thus bringing the time within which to file suit to October 24, 1949. Respondent raised the jurisdictional bar of Section 2 on November 15, 1948, slightly more than a month after suit was commenced (R. 8). The statute of limitations still had more than eleven months to run. But not until seventeen months later (April 26, 1950) did petitioner move to strike (but not on constitutional grounds) and to transfer the cause to Utah under Section 1406(a) (R. 11, 12).

*Guaranty Trust Co.* v. *York* had been decided by this Court on June 18, 1945; *Angel* v. *Bullington* on February 17, 1947. The *Woods*, *Ragan* and *Cohen* cases were decided on June 20, 1949. Thus almost four months remained after these decisions in which to start suit in Utah, but petitioner

chose not so to do. It was not until November 8, 1950, after the decisions by the Court of Appeals in the *Trust Company of Chicago* case (July 3, 1950) and the *Munch* case (October 9, 1950) that petitioner amended its motion to strike to raise the constitutional questions now presented (R. 13).

The Court of Appeals correctly affirmed the District Court's denial of the alternative motion to transfer.

## IV.

### THE PROVISO TO SECTION 2 DOES NOT VIOLATE SECTION 13 OF ARTICLE IV OF THE ILLINOIS CONSTITUTION OF 1870.

In its essence, petitioner's argument is that, under Section 13 of Article IV (the single-subject provision of the Illinois Constitution of 1870—"No act hereafter passed shall embrace more than one subject and that shall be expressed in the title.") the proviso to Section 2 is invalid because it could not originally have been enacted as a part of the Injuries Act for the reason it does not come within the title of the Act—"An Act requiring compensation for causing death by wrongful act, neglect or default."

The argument made is without foundation. But even if it had merit, this Court will be very reluctant to declare the proviso to be in violation of the state constitution, for the reason that it is an elementary principle of federal jurisprudence that the federal courts are reluctant to adjudicate a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals. And this reluctance becomes more imperative when the statute has been before the highest court of the state and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented or determined

(*Michigan Central Railroad* v. *Powers*, 201 U. S. 245, 291, 292).

Since 1908, several cases concerned with the proviso to Section 2 of the Injuries Act have been decided by the Supreme Court of Illinois (*Crane* v. *C. & W. I. R. R. Co.*, 233 Ill. 259; *Dougherty* v. *American McKenna Co.*, 255 Ill. 369; *Walton* v. *Pryor*, 276 Ill. 563, and *Wall* v. *Chesapeake & Ohio Ry. Co.*, 290 Ill. 227).

As stated, the argument now made is without merit. *Michaels* v. *Hill*, 328 Ill. 11, 15-16, quoted by the Court of Appeals (190 F. 2d 493, 496; R. 49), clearly sustains the validity of the proviso to Section 2.

The Court of Appeals, as did the District Court, correctly held that the Illinois Constitution was not violated.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

HOWARD ELLIS,
*Attorney for Respondent.*

WILLIAM H. SYMMES,
DAVID JACKER,
CHARLES M. RUSH,
JOHN M. O'CONNOR, JR.,
*Of Counsel.*

## Appendix.

Illinois Revised Statutes (1947), Chapter 70:

### Wrongful Death.

An Act requiring compensation for causing death by wrongful act, neglect or default. (Approved February 12, 1853. L. 1853, p. 97.)

1. Killing—Action survives) Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

2. Action—By whom Brought—Limit of Damages—Death outside State.) Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with refer-

ence to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000: Provided, that every such action shall be commenced within one year after the death of such person. Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

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## No. 349

---

FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,

*Petitioner,*

*vs.*

UNITED AIR LINES, INC., A CORPORATION,

*Respondent.*

---

## PETITION FOR REHEARING.

---

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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UNITED AIR LINES, INC., A CORPORATION,

*Respondent.*

---

## PETITION FOR REHEARING.

---

Now comes United Air Lines, Inc., a corporation, respondent, and presents this, its petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

The net practical result of the majority opinion is that the Utah Legislature has been empowered to veto what cases must be heard in the Illinois courts. By the same token, so have been the Legislatures of all the States.

The plaintiff in the instant case could have had his day in court in Utah, where the cause of action arose—a cause of action created by the Utah Legislature. Herein lies the difference between the instant case and *Hughes* v. *Fetter,* 341 U. S. 609, where the plaintiff had no day in court—and was hence denied due process of law—if the Wisconsin statute was valid. Plaintiff still can have his

day in court in Utah, if the cause is transferred there, or in the Federal courts in Illinois if the Illinois statute is held inapplicable to the Federal courts.

The majority opinion nullifies a portion of the Illinois Injuries Act by virtue of its interpretation of the Full Faith and Credit Clause. The resulting danger from such interpretation was pointed out by Mr. Justice Black in *Order of Travelers* v. *Wolfe*, 331 U. S. 586, 627, 642, in which he warned against imposing a "state of vassalage" on the forum and against nullifying "a great purpose of the original Constitution, as later expressed in the Tenth Amendment, to leave the several states free to govern themselves in their domestic affairs."

The availabile history of the Full Faith and Credit Clause indicates that the purpose of that clause was to prevent litigants from escaping their just obligations by crossing state lines. (The Authenticated Full Faith and Credit Clause; Its History—Radin, 39 Ill. Law Review 1; Full Faith and Credit—The Lawyer's Clause of the Constitution—Jackson, 45 Columbia Law Review 1; dissenting opinion, *Hughes* v. *Fetter*, 341 U. S. 609, 614-615.) The Illinois statute cannot and does not have that effect.

This case does not involve a conflict between the Full Faith and Credit Clause and the legislation of a given state: it involves the basic conflict between the strong unifying principle embodied in the Full Faith and Credit Clause and the stronger policy, explicitly spelled out by subsequent Constitutional Amendment, to leave the States free to govern themselves in their domestic affairs—a conflict overlooked both in *Hughes* v. *Fetter* and in the majority opinion in this case.

Illinois, a magnet to foreign litigation because of large jury verdicts, should have the right, power, and even duty, to control its own courts, so that its citizens will not be

subject to long and expensive delays. The present invalidation of the Illinois statute will bring a flood of death cases to Illinois' already overcrowded courts—cases which could not be brought in Illinois when the plaintiff had his day in court in the forum of the occurrence.

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted.

Respectfully submitted,

HOWARD ELLIS,
*Counsel for Respondent, United Air Lines, Inc.*

CERTIFICATE OF COUNSEL.

I, Howard Ellis, Counsel for the above named Respondent, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

HOWARD ELLIS,
*Counsel for Respondent, United Air Lines, Inc.*